TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. ELLIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED DECEMBER 27, 1899.

(17,237.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1899.

1 UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } ss:

Record of the proceedings of the circuit court of the United States within and for the eastern division of the northern district of Ohio, in the cause and matter hereinafter stated, the same being disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the 4th day of said month, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the 123rd, to wit, on the 14th day of November, A. D. 1898.

Present: The Honorable Augustus J. Ricks, United States district judge.

EDWARD B. WESLEY, Complainant, *vs.* HOWARD P. EELLS, Defendant. } Chancery. No. 5734.

Said action was commenced on the 19th day of January, A. D. 1898, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

2 *Bill of Complaint.*

The United States Circuit Court in and for the Eastern Division of the Northern District of Ohio.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff, *against* HOWARD P. EELLS, a Citizen of the Eastern Division of the Northern District of Ohio, Defendant. } In Equity.

To the honorable the judges of the circuit court of the United States in and for the eastern division of the northern district of Ohio:

Edward B. Wesley, of Port Chester, New York, a citizen of the State of New York, brings this his bill against Howard P. Eells, of the city of Cleveland, county of Cuyahoga, eastern division of the northern district of the State of Ohio, and a citizen of the State of Ohio and an inhabitant of said district.

And thereupon your orator complains and says:

1. That the plaintiff is and at the times hereinafter named was a citizen of the State of New York, and that the defendant is and at the times hereinafter mentioned was a citizen of the State of Ohio — a resident of the eastern division of the northern district of Ohio.

2. That on and prior to the sixteenth day of February, 1892, the State of South Carolina was the owner in fee-simple of the following-

described premises situate in the city of Columbia, county of
3 Richland, and State of South Carolina, to wit: "All that lot, piece, or parcel of land, situate in the city of Columbia and containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as 'Agricultural Hall' (formerly known as 'Parker's Hall'), bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street, and on the south and west by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated the 3rd day of May, A. D. 1875, and recorded in Book 'K' of Deeds, pp. 106 and 107; also all that certain parcel or lot of land situate, lying, and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the Agricultural Hall building and lot immediately in rear thereof, east by Richardson street, south by lot now or formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker, said lot being a rectangular parallelogram in shape, and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-six feet and from east to west two hundred and eight feet, the said lot also adjoining a part of the Agricultural Hall block and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1875, and recorded in R. M. conveyance office for Richland county, in Book 'K' of Deeds, pp. 319 and 320, the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston, dated April 9th, 1883, and recorded in R. M. conveyance office, in Book 'P' of Deeds, &c., p. 87."

4 3. That, being so seized in fee of the said premises, the said State of South Carolina, by an act of the General Assembly of said State duly passed and approved, caused the said premises to be sold at public auction, in the manner prescribed by said act, on the second day of February, 1892, and at said sale the plaintiff, by his attorney, bid off the said premises at and for the price of sixteen thousand one hundred and sixty-five dollars, he being at that price the highest and last bidder therefor.

4. That by the terms of said sale the purchaser was required to pay in cash one-third of the purchase price of said premises and to execute his bond and mortgage of the premises to secure the payment of the balance of said purchase price in two equal annual instalments, with interest from the date of said purchase, the obligor to have the option of paying up the whole or any part of the sum so to be secured by said bond at any time before the maturity thereof.

5. That this plaintiff having become the purchaser of said property aforesaid, for his convenience caused the deed therefor to be made to one J. W. Alexander, of the State of North Carolina, who consented to act as trustee for this plaintiff for the purchase of said premises, and the deed therefor was duly executed and delivered by the commissioners of the sinking fund of the State of South

Carolina to said J. W. Alexander in fee-simple, without any declaration of trust on the face thereof; and thereupon the said J. W. Alexander duly executed and delivered to the treasurer of the State of South Carolina his bond, in the penal sum of twenty-one thousand five hundred and fifty-three and $\frac{34}{100}$ dollars, conditioned
5 for the payment of the full and just sum of ten thousand seven hundred and seventy-six and $\frac{67}{100}$ dollars in two equal annual instalments from the date of said bond, with interest thereon, payable annually, with the proviso that the said J. W. Alexander, obligor, should have the privilege of forestalling the said bond by paying the whole or any part of the amount secured thereby at any time before the maturity thereof, the said bond and mortgage and the deed of convevance to the said J. W. Alexander being dated the second day of February, 1892, the day of the sale of said premises at public auction, as aforesaid.

5. That this plaintiff, on said sixteenth day of February, 1892, being the owner and holder of a large amount of revenue bond scrip duly issued by the State of South Carolina, "being valid obligations of the State of South Carolina," as hereinafter more particularly alleged, which was receivable at par by the said State for taxes and all other dues to the State of South Carolina, furnished to said J. W. Alexander a sufficient amount thereof for the purpose hereinafter indicated, and the said J. W. Alexander, by his attorneys therein, and then and there exercising the privilege reserved to himself by the terms and conditions of said bond to pay up the whole of the amount secured thereby, duly tendered to the Honorable W. T. C. Bates, State treasurer of the State of South Carolina, the full amount then due thereon, including interest from the second day of February, 1892, up to and including the sixteenth day of February, 1892, the day of said tender, the said W. T. C. Bates, as State treasurer, then and there having the custody and possession of the said bond and mortgage, and being the proper officer designated by law
6 for the receipt of the amount secured by said bond and mortgage, and being the obligee named therein; which tender, however, was refused by the said W. T. C. Bates, State treasurer as aforesaid.

6. That by the laws of the State of South Carolina a tender in full of the amount of money due to a mortgagee secured by a mortgage of real or personal property at any time when the mortgagor has a right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage securing the payment of such money, whether the amount so tendered be accepted or not and whether the mortgagor shall keep himself in position to make good the tender or not.

7. That thereafter the said W. T. C. Bates, treasurer of the State of South Carolina, as aforesaid, in violation of the rights of this plaintiff and of the said J. W. Alexander, in whose name the title to said property then stood, caused the said mortgage to be filed for record in the office of the register of mesne conveyances for Richland county, the office where the said mortgage should have been recorded if a valid and subsisting mortgage, and the same was then

and there entered upon the books of registry of said office; but this plaintiff charges "that the said mortgage having been extinguished by the tender of the amount due thereon, there was no authority of law for the recording of the same."

8. That thereafter the said J. W. Alexander, at the request of this plaintiff, duly conveyed the said premises to this plaintiff in fee-simple by deed duly executed and thereafter recorded, dated the 11th day of February, 1893.

9. That the revenue bond scrip so held by this plaintiff, as aforesaid, was duly issued by the State of South Carolina to this plaintiff in the manner following, to wit:

7 By an act of the General Assembly of the State of South Carolina approved the 15th day of September, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," the State of South Carolina, by a guaranty endorsed thereon, pledged its faith and credit to the payment of the principal and interest of certain bonds to be issued by the said railroad company to the amount of four million dollars ($4,000,000). The said bonds authorized by the said act, with the guaranty of the State of South Carolina endorsed thereon, were thereafter in fact duly issued.

10. That by an act of the General Assembly of the State of South Carolina approved the 2nd day of March, 1872, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same," it was recited that the bonds of the aforesaid Blue Ridge Railroad Company, with the guaranty of the State endorsed thereon, had been issued, and that the State was desirous of withdrawing them, and thus relieving herself from such liability, and provided that all such bonds then held by the official agent of the State of South Carolina as security for advances of money made to the railroad company by the State should be delivered up and cancelled, relieving the railroad company from all liability on account of such advances, and further providing that upon the surrender by the company to the State of the balance of the issue of four millions of dollars of such bonds, issued and guaranteed as aforesaid, the State treasurer should issue in lieu thereof, to the amount of one million eight hundred thou-

8 sand dollars, certificates of indebtedness, styled revenue bond scrip, expressing that the sum mentioned therein is due by the State of South Carolina to bearer, and that the same will be received in payment of taxes and all other dues to the State except special tax levied to pay interest on the public debt, and that "if the said company shall not be able to deliver all of said bonds at one time, the treasurer is authorized and required to deliver to the said president such amount of such treasury certificates as shall be proportioned to the amount of bonds delivered." The act further provides:

"SEC. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in pay-

ment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt, and the State treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied to be collected in the same manner and at the same time as may be provided by law for the levy and collection of the regular annual taxes of the State; and the State treasurer is hereby required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

"SEC. 5. That if any such revenue bond scrip is received
9 in the treasury for the payment of taxes, the treasurer be, and he is hereby, authorized to pay out such revenue bond scrip in satisfaction of any claim against the treasury, except for interest that may be due on the public debt."

II. That this plaintiff being then a man of means and engaged in the banking business in the city of New York, in the State of New York, application was made to him by the State treasurer of the State of South Carolina, and the financial agent of the State of South Carolina resident in the city of New York, accompanied by two bank presidents of the city of Columbia, the capital of said State of South Carolina, to advance the funds necessary to take up and retire certain of the Blue Ridge Railroad bonds so guaranteed by the State of South Carolina and which had been then duly issued by the said railroad company; but the credit of the State of South Carolina in New York and other financial centres had been greatly impaired, and it was with difficulty that this plaintiff was induced to accede to the proposition, and as representing a prominent banking-house in the city of New York this plaintiff had previously refused to consider any proposition for becoming interested in the said Blue Ridge Railroad bonds, or in the revenue bond scrip intended to make up and retire the same. But it being represented to this plaintiff that it was a matter of great importance to the finances of the State of South Carolina to have the four millions of dollars of the Blue Ridge Railroad bonds so guaranteed by the State of South Carolina retired, and with an assurance that there should be placed in his hands $1,005,000 of the revenue bond scrip as collateral security for any money he should advance in the matter of withdrawing from hypothication the said Blue Ridge Railroad bonds, he
10 consented to advance the sum of three hundred and forty-four thousand nine hundred and twenty-five dollars in actual cash, and with such sum he redeemed the sum of two millions nine hundred and two thousand dollars of the aforesaid Blue Ridge Railroad bonds, with all their coupons attached; and delivered the same to the treasurer of the State of South Carolina with all of the coupons thereto attached, and the said bonds and attached coupons, mutilated

and cancelled in accordance with the provisions of said act, are now in the office of the State treasurer of said State.

12. That this plaintiff thereupon received from the State treasurer of the State of South Carolina one million five thousand dollars in the aforesaid revenue bond scrip which was thus duly issued by the State of South Carolina.

13. That the said Blue Ridge Railroad bonds so issued by said corporation and guaranteed by the State of South Carolina, as aforesaid, were the valid obligations of said State, and the event has since proven that if not taken up and retired the State of South Carolina would have been compelled to pay the same in full, and this plaintiff has continued to be and now is the owner and holder of said revenue bond scrip, as aforesaid, and he charges that by the tender thereof to the treasurer of the State of South Carolina the mortgage of the said J. W. Alexander was extinguished by operation of law.

14. That this plaintiff, being so seized of the premises above described, on the — day of ——, 1897, for valuable consideration, entered into a contract in writing with the defendant, Howard P. Eells, whereby the said plaintiff contracted to convey the said
11 premises to the said defendant, Howard P. Eells, in fee-simple, free from any valid lien or encumbrance whatever, at and for the price of twenty thousand dollars, to be paid to this plaintiff in cash, and this plaintiff avers that the value of said premises is now and was at the time of said contract at least said sum of twenty thousand dollars.

15. That this plaintiff is now ready and has offered to deliver to said Howard P. Eells a good and sufficient deed in law to convey the said premises to him in fee-simple, but the said defendant, Howard P. Eells, refuses to comply with his said contract and to receive said deed and pay to this plaintiff the said purchase price, averring that the said revenue bond scrip so tendered by the said J. W. Alexander in payment of the amount due upon his bond and mortgage, as aforesaid, was not the valid obligation of the State of South Carolina, and therefore did not constitute a legal tender for said debt, and that by reason thereof the said tender did not operate as an extinguishment of the lien of said mortgage; and this plaintiff alleges that there are no liens or encumbrances upon said premises, save that the authorities of the State of South Carolina have failed and refused to enter up taxes due to the State of South Carolina and to the city of Columbia on account of the property, but this plaintiff avers that the sum of five hundred dollars would be adequate to cover all liability therefor, and this plaintiff now brings into this court a deed of said premises, duly executed, and tenders the same to the said defendant and offers to allow the said defendant to retain
in his possession so much of the purchase price agreed upon,
12 as aforesaid, as may be ascertained by this court to be sufficient as a fund to meet the taxes which should have been charged up against the said premises, as aforesaid.

In tender consideration whereof and forasmuch as the plaintiff is remediless in the premises at and by the strict rules of the common law and can only have relief in a court of equity, where matters of

this nature are properly cognizable and relievable, to the end, therefor-, that an account may be taken by and under the direction of the decree of this honorable court to ascertain the amount to be retained by the said defendant as indemnity against the taxes chargeable upon said premises, as aforesaid, and that the defendant may be decreed to accept from said plaintiff the deed of said premises hereby tendered, and to pay to this plaintiff the sum of twenty thousand dollars, with interest thereon from this date, less the sum so to be reserved by him on account of said taxes, as aforesaid, and that this plaintiff may have such other and further relief in the premises as the nature of the circumstances in this case may require and to your honors shall seem meet, may it please your honors to grant unto the plaintiff a writ of subpœna, to be addressed to the said Howard P. Eells, thereby commanding him, at a certain time and under certain penalties therein to be limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer to make to all and several the premises, and further to stand to, perform, and abide by such further order, direction, and decree therein as to this honorable court shall seem meet.

WM. H. LYLES,
JAMES M. SHALLENBERGER,
Plaintiff's Solicitors.

13 THE UNITED STATES OF AMERICA, } ss:
District of New York, }

On this 27th day of December, 1897, before me personally appeared Edward B. Wesley, the above-named plaintiff, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

EDWARD B. WESLEY.

[SEAL.] JOHN A. WILLIAMS,
Notary Public, Kings Co.

Ctf. on file in N. Y. Co.

CLEVELAND, OHIO, *Dec. 28th*, 1897.

I hereby waive the issuing and service of process and enter my appearance to the within bill.

HOWARD P. EELLS,
By A. ST. J. NEWBERRY,
His Solicitor.

14 Endorsements on bill of complaint. 5734. The United States circuit court in and for the eastern division of the northern district of Ohio. Edward B. Wesley, a citizen of the State of New York, plaintiff, *vs.* Howard P. Eells, a citizen of the eastern division of the northern district of Ohio, defendant. Bill of com-

plaint, with entry of appearance, &c. Original. Jas. M. Shallenberger, Wm. H. Lyles, pl'ff's sol'r-. Filed Jan. 19, 1898. Irvin Belford, clerk U. S. circuit court, N. D. O.

15 *Order of Continuance.*

October Term, A. D. 1897, to wit, January 31st, 1898.

Present: Honorable Augustus J. Ricks, United States district judge.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS. } # 5734. Chancery.

This cause is continued to the next term of this court.

16 *Answer.*

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division.

EDWARD B. WESLEY, Complainant,
vs.
HOWARD P. EELLS, Defendant. } No. 5734.

The answer of Howard P. Eells, the defendant, to the original bill of complaint of Edward B. Wesley, complainant.

This defendant, now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, saith:

1. That he admits that the complainant is a citizen of the State of New York, and that this defendant is a citizen of the city of Cleveland and of the northern district and eastern division of the State of Ohio.

2. That he admits the statements and allegations of said bill contained in paragraphs one, two, three, four, five, eight, nine, ten, eleven, twelve, and fourteen to be true.

3. As to the allegations in the second paragraph numbered five of said bill, the defendant admits that the allegations of fact therein are true, excepting, however, that defendant does not admit, but denies, the conclusion of law in said paragraph averred, viz, that the said revenue bond scrip was a valid obligation of the State of South Carolina.

4. As to the allegations in paragraph numbered six of said bill, the defendant saith that he has no knowledge or information whereby he can form an opinion or belief whether the same
17 are true or not, and therefore denies the same and prays that proof may be made thereof.

5. As to all the allegations of said bill contained in paragraph seven thereof, this defendant admits the allegations of fact therein set out, but denies the conclusion of law therein averred, viz, that said mortgage having been extinguished by the tender of the amount due thereon, there was no authority of law for the recording of the same.

6. As to all the allegations contained in paragraph fifteen of the said bill, the defendant admits that it is true that said plaintiff has offered to deliver to the defendant a sufficient deed of the premises in said bill described, and that this defendant has refused to comply with his contract, receive said deed, and pay said plaintiff the purchase price, averring that the said revenue bond scrip tendered by the said J. W. Alexander was not the valid obligation of the State of South Carolina, did not constitute a legal tender for said debt, and did not operate as an extinguishment of the lien of said mortgage, and that said deed did not convey a clear and unincumbered title thereto.

7. This defendant further admits that there are no liens or incumbrances upon said premises, saving and except the mortgage in said bill described, excepting an unentered and uncertain amount of taxes due to the State of South Carolina and the city of Columbia on account of the property, which amount of taxes when ascertained should be deducted from the purchase price payable by this defendant to said plaintiff for said premises, provided any amount whatever shall be by the court found payable; and the defendant prays the court that such amount of incumbrance for the taxes may be ascertained and the same may be deducted from the amount the court may find payable by the defendant to plaintiff, if in fact the court shall find any amount whatever so payable.

8. And the defendant, further answering, says that the State
18 of South Carolina, by its General Assembly, did, on or about the 13th day of March, A. D. 1872, pass a certain act entitled "An act to abolish the office of State auditor, and to confer the duties of his office upon the comptroller general," which act is still in force and effect.

And the State of South Carolina, by its General Assembly, did, on or about the 22nd day of October, 1873, duly pass an act wherein and whereby section 4 of the act of March 2nd, 1872, in said bill of complaint referred to, was duly repealed, and which further provided that the comptroller general of the State of South Carolina was forbidden to levy any tax for any purpose whatever, unless expressly thereafter authorized so to do by statute; which said act of October 22nd, 1873, is still in full force and effect.

And the State of South Carolina, by its General Assembly, on or about the 22nd day of December, 1873, did duly pass a certain act, entitled "An act to raise supplies for the fiscal year commencing November 1st, 1873, and to alter and amend the law relating to the collection of taxes;" which said act is still in full force and effect, and among other things provides that county auditors and county treasurers are forbidden to collect any taxes for the redemption of the said revenue bond scrip, and further providing that any State

or county officer violating any of the provisions of said act shall be guilty of felony and punished as in the act provided.

And this defendant avers that if the said revenue bond scrip ever had any validity whatever, which this defendant does not admit, but denies, that by the passage of the laws above referred to such validity was destroyed and said revenue bond scrip ceased to have any force or effect whatever.

9. This defendant further avers that the act of the legislature of South Carolina passed March 2nd, 1872, which authorized the execution and delivery of the said revenue bond scrip, was in violation of article one, section ten, of the Constitution of the United States, inasmuch as the said revenue bond scrip are bills of credit, and the said scrip is consequently from its inception illegal, void, and of no validity.

10. This defendant further avers that said act of March 2, 1872, authorizing the said revenue bond scrip, is in violation of section seven, ten, and fourteen of article nine of the constitution of the State of South Carolina, and said act is therefore null and void.

11. And the defendant, further answering, says on information and belief that the State of South Carolina and its legislature, officers, and agents now and for a long time past have declared and maintained that said revenue bond scrip was not a valid obligation of the State of South Carolina, and have refused to recognize the same or accept the same in payment of any dues or indebtedness of said State in accordance with the terms of said scrip, and that certain persons, whose names are unknown to this defendant, but whom the defendant avers to be officers, agents, and employees of the State of South Carolina, have taken possession of the premises in said bill described, claim to hold the same as the property of the State of South Carolina, and retain the same by force of arms, and have refused and still refuse to surrender the said premises to any person whatever claiming title to the same under the mortgage made by Mr. J. W. Alexander, described in said bill to be in the State of South Carolina, and insisting that said mortgage is a subsisting and valid lien upon the premises aforesaid and has been in no way satisfied or discharged.

12. And this defendant further avers that he has been at all times and now is ready and willing to perform his said contract and to make payment as therein specified, provided that he can receive a full and perfect title to said premises, free from any valid lien, and be protected in the quiet and peaceable possession thereof.

13. And this defendant, further answering, denies that any other matter, cause, or thing in said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court

shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. ST. J. NEWBERRY,
Defendant's Solicitor.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Howard P. Eells, the above-named defendant, being duly sworn, says that all the statements and allegations in the foregoing answer contained are true, excepting so far as the same are stated on information and belief, and as to them he believes them to be true.

H. P. EELLS.

Sworn to before me by the said Howard P. Eells and by him subscribed in my presence this third day of February, A. D. 1898.

BENJ. A. GAGE,
[SEAL.] *Notary Public.*

21 Endorsements on answer: 5734. E. B. Wesley, complainant, *vs.* Howard P. Eells, defendant. Answer. Filed Feb. 3, 1898. Irvin Belford, clerk U. S. circuit court, N. D. O. A. St. J. Newberry, defendant's solicitor.

22 *Replication.*

The United States Circuit Court in and for the Eastern Division of the Northern District of Ohio. In Equity.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
HOWARD P. EELLS, a Citizen of the Eastern Division of the Northern District of Ohio, Defendant. } Replication.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

WM. H. LYLES,
J. M. SHALLENBERGER,
Plaintiff's Solicitors.

23 Endorsements on replication: The State of Ohio. In the U. S. circuit court, northern district, eastern division. Edward B. Wesley, complainant, *vs.* Howard P. Eells, defendant. Replication. Filed Feb. 4, 1898. Irvin Belford, clerk U. S. circuit court, N. D. O. Wm. H. Lyles, James M. Shallenberger, plaintiff's solicitors.

24 *Agreement to Submit and Memo. of Documentary Evidence.*

The United States Circuit Court in and for the Eastern Division of the Northern District of Ohio.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
HOWARD P. EELLS, a Citizen of the Eastern Division of the Northern District of Ohio, Defendant.
} In Equity.

The above-entitled cause being at issue upon complainant's bill of complaint, defendant's answer, and the plaintiff's replication thereto—

It is hereby agreed by and between the solicitors representing the plaintiff and the defendant—

That said cause shall be submitted to the court upon the documentary evidence taken and noted below and upon written arguments to be submitted by the solicitors for the plaintiff and defendant.

WM. H. LYLES,
J. M. SHALLENBERGER,
Plaintiff's Solicitors.
A. ST. J. NEWBERRY,
Def't's Solicitor.

Memorandum of Documentary Evidence Introduced in the Above-entitled Cause under the Above Stipulation.

Plaintiff's testimony.

1st. Section 1894 of the General Statutes of the State of
25 South Carolina of 1893, as follows: "Section 1894. Any person who shall have received full payment or satisfaction or to whom a legal tender shall have been made of his debt, damages, costs, and charges, secured by mortgage on real estate, shall, at the request of the mortgagor, or his legal representative, or of any other person being a creditor of the said debtor, or a purchaser under him, or having an interest in any estate bound by such mortgage, and on tender of the fees of office for entering, such satisfaction shall within three months after such request made, enter satisfaction in the proper office on such mortgage, which shall forever thereafter discharge and satisfy the same."

Plaintiff then offers in evidence the case of Salinas *vs.* Ellis, 25th S. C. Reports, 337, where the following principles were decided:

"1. After a mortgage of land was past due and before action brought, the mortgagor made tender to the attorney of the mortgagee of the amount due, which under instructions from the mortgagee was refused, because it did not include another distinct debt due by the mortgagor, but not covered by the mortgage; held, that the lien of the mortgage was discharged.

"2. There was no proof that the tender was made on the condition of entry of satisfaction, but if so, such condition would have been a legal right, and would not have vitiated the tender.

"3. The mortgagor, having failed afterwards to make his tender good on the offer of the mortgagee to accept it, and having failed to bring the amount into court, the tender so made, while it discharged the lien of the mortgage, did not prevent a judgment for the full debt."

26 Plaintiff then offers in evidence act of the General Assembly of the State of South Carolina approved the 24th day of December, A. D. 1890, 20th Statute-, 707, entitled "An act to provide for the sale of lot and building known as Agricultural Hall, etc., and to appropriate the proceeds thereof." By this act the lot and building described in the complaint were ordered to be sold by the commissioners of the sinking fund of the State of South Carolina. This is the act referred to in paragraph three of the complaint.

Plaintiff then offers in evidence act of the General Assembly of the State of South Carolina approved March 2nd, A. D. 1872, 15th Statute-, 79, entitled "Act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same." This act is quoted in full in the printed brief of argument of Amos D. Williams *vs.* Johnson Hagood, com-troller general, reported in 98 U. S., 72 (Book 25, L. ed., 51). Brief of argument is herewith filed only for the purpose of giving the act in question, pages four to eight, both inclusive.

Plaintiff then offers in evidence section one of article two of the constitution of the State of South Carolina as follows, to wit: "Legislative power.—Section 1. The legislative power in this State, shall be vested in two distinct branches, the one to be styled 'the senate,' and the other, 'the house of representatives,' and both together, 'the General Assembly of the State of South Carolina.'"

Also article fourteen, section four, as follows, to wit: "Claims against State.—Section 4. The General Assembly may direct by law, in what manner claims against the State may be established and adjusted."

27 Plaintiff then offers in evidence act of the General Assembly of the State of South Carolina entitled "An act to incorporate the Blue Ridge Railroad Company in South Carolina," approved the 16th day of December, A. D. 1852, 12th Statutes, 182. This act recited: "Whereas, it is highly expedient, as well for the interest of a large portion of the people of North Carolina, Tennessee and of Georgia, as of South Carolina, that such a railroad communication should be established, but such communication cannot be effected without the co-operation of this State, in opening the way

for the same along that part of the proposed route which is in South Carolina." By sec. 13 of this act the comptroller general of the State of South Carolina was authorized and directed to endorse the guaranty of the State of South Carolina on $1,250,000 of the bonds of the Blue Ridge Railroad Company, which were only to be issued, however, upon certain conditions, and by section 14 of that act a statutory lien upon the property and franchises of the corporation for the security of the bonds was imposed. It is, however, admitted that the bonds, with the guaranty endorsed, were never delivered.

Plaintiff then offers in evidence an act of the General Assembly of the State of South Carolina entitled "An act to authorize aid to the Blue Ridge Railroad Company in South Carolina," approved December 21, A. D. 1854, 12th Statutes, page 327. This act provided for the subscription by the State of South Carolina of $1,000,000 to the capital stock of the Blue Ridge Railroad Company, and by section 3 provides: "That the State shall have the same rights in the company, and in its management, as is reserved to private shareholders, and the General Assembly shall at all times have authority to examine into its condition, and the said company shall annually submit to the General Assembly, a report,
28 exhibiting the condition of its affairs and its prospects." By section 7 of the act the guaranty of the State was directed to be endorsed upon the bonds of the company, not to exceed the amount of $1,000,000, and the provision in the act of 1852 above referred to, authorizing the endorsement of the guaranty of the State, is repealed.

Plaintiff then offers in evidence an act of the General Assembly of the State of South Carolina (Dec. 22nd, 1859, 12 Stats., 651) entitled "An act to authorize the boards of commissioners of roads of certain districts to make subscription to the Greenville & French Broad railroad and to the Blue Ridge railroad in South Carolina." This act was of the character indicated by its title.

Plaintiff then offers in evidence an act of the General Assembly of the State of South Carolina approved the 22nd day of December, 1859, 12th Statutes, 654, entitled "An act to grant aid to the Blue Ridge railroad." This act directed the comptroller general of the State of South Carolina to subscribe $310,000 to the stock of the Blue Ridge railroad in South Carolina for the purpose of completing the said road to Walhalla; said amount to be paid in bonds of the State of South Carolina, payable in five years, at six per cent. per annum, to be signed by the comptroller general and issued to the said company upon the making of the said subscription. It also provided that the aid granted by this act shall not be construed to exonerate the stockholders from paying up their subscriptions to the capital stock of the said company, but the company shall call in and apply the same according to the provisions of their charter.

29 Plaintiff then offers in evidence an act of the General Assembly of the State of South Carolina approved the 15th day of September, A. D. 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina." This act recited the act of 1854, 14th Statutes, page 25, above referred to,

and the conditions therein prescribed, which were to be performed before the delivery of the bonds, with the guaranty of the State endorsed, and then recited: "Whereas, the comptroller general of the State has not endorsed any of the bonds issued by the said Blue Ridge Railroad Company in South Carolina, under the authority of said act, and whereas, the conditions imposed upon said endorsement by said section 7, have become impossible and injudicious, while the necessity of the completion of said road has become more urgent in the interest of the State."

Section 1 of said act provides as follows, to wit:

"SECTION 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, without reference to the said provisions and conditions, whenever a contract or contracts may be made by the president of the said company, under its seal, and as provided by said act, and not exceeding one million of dollars, it shall be the duty of the comptroller general to endorse thereon, that the faith and funds of the State are pledged to the faithful performance of the said contract or contracts as respects the provisional payment both of the principal and interest, according to the terms of the said contract or contracts, provided that so much of said issue as may be necessary not exceeding $300,000 shall be applied to the redemption of the present bonded indebtedness of said company."

By section 2 of the said act the guaranty of the State was
30 directed to be endorsed by the comptroller general upon an additional three million of dollars of the bonds of said company, and provided that henceforth the franchises and privileges, rights and property of the company should stand "pledged and mortgaged to the State, without any further act or deed on the part of the company, for the faithful and punctual performance on the part of the said company of such contract in priority and perference to any other debt which the said company may hereafter create or incur, and further provided that the said bonds or any part thereof shall not be used unless upon the express condition that upon application to the Congress of the United States or to private capitalists the amount of three million of dollars in currency, or so much of that sum as may be necessary, shall be furnished in exchange or upon the security of said bonds." This was the act under which the comptroller general of the State of South Carolina endorsed the guaranty of said State upon the four millions of dollars of bonds of said company mentioned in the recital of the act of 1872 first above referred to. It is admitted that this act of 1868 does not appear by the journals of the senate and the house of representatives to have been passed by a two-thirds vote of the members of each branch of the General Assembly.

Plaintiff then offers in evidence Senate Journal of the State of South Carolina, session 1871–1872, page 526, where it is recorded that the act of 1872 first above referred to, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for

the securing and destruction of the same," was duly passed
31 by the senate by a vote of 21 yeas to 5 nays, duly recorded on the said journal.

Plaintiff then offers in evidence the same Journal of the Senate, at page 572, where the act is passed over the veto of the governor by a vote of 22 yeas to 6 nays, which was duly recorded on the said journal.

Plaintiff then offers in evidence the Journal of the House of Representatives of the State of South Carolina, session of 1871–1872, page 417, where it is duly recorded that the same act passed its third reading in the house of representatives by a vote of 87 yeas to 19 nays, duly recorded in the manner prescribed by the Constitution; also at page 546, where it is duly recorded that the same act was passed over the veto of the governor by a vote of 84 yeas to 18 nays, duly recorded according to the provisions of the constitution.

Plaintiff then offers in evidence the reported case of the State *vs.* Spartanburg & Union Railroad Company, 8th S. C., 129, where it appears that the S. & U. railroad was sold under foreclosure of a statutory lien taken by the State of South Carolina as security for her endorsement upon the bonds of the said company.

Plaintiff then offers in evidence the decision of the supreme court of the State of South Carolina in the case of Gibbs *vs.* G. & C. Railroad Company, 13th S. C., 228, where it appears that the Columbia & Greenville railroad was sold under foreclosure of a like statutory lien to secure the endorsement of the State of South Carolina on the bonds of that company.

Plaintiff then offers in evidence the case of Hand *vs.* C. & S.
32 Railroad Company, 12th S. C., 314, where it appears that the supreme court of South Carolina, in the adjustment of the claims against the Charleston & Savannah railroad, recognized the validity of the claims of holders of the bonds of said company guaranteed by the State of South Carolina under the act of 1869.

Plaintiff then offers in evidence article 16 of the constitution of the State of South Carolina, adopted as an amendment in 1873. This article provides: "Public debt—Vote of people.—To the end that the public debt of South Carolina may not hereafter be increased without the due consideration and free consent of the people of this State, the General Assembly is hereby forbidden to enact any further debt or obligation either by the loan of the credit of the State, by guaranty, endorsement, or otherwise, except for ordinary and current business of the State, without first submitting the question as to the creation of any such new debt, guaranty, endorsement, or loan of its credit to the people of this State at a general State election and unless two-thirds of the qualified voters of this State voting on the question, shall be in favor of a further debt, guaranty, endorsement or loan of its credit, none such shall be created or made."

Plaintiff then offers in evidence the case of The State *vs.* Cardozo, treasurer, 5th S. C., 297, and Bond Debt cases, 12 S. Car., page 200; also the case of Morton Bliss & Co. *vs.* The Comptroller Gen'l, 4 S. C., 430.

Defendant then offers in evidence on his part section 7 of article

9 of the constitution of the State of South Carolina, as follows, to wit: "Extraordinary expenditures.—Sec. 7. For the purpose of defraying extraordinary expenditures, the State may contract
33 public debts but such debts shall be authorized by law for some single object to be distinctly specified therein, and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays upon the journal of each house respectively, and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

Defendant then offers in evidence section 10 of the same article: "Section 10. No scrip certificate or other evidence of State indebtedness shall be issued except for the redemption of stock, bonds or other evidences of indebtedness, previously issued or for such debts as are expressly authorized in this constitution."

Defendant then offers in evidence section 14 of the same article: "Section 14. Any debt contracted by the State shall be by loan on State bonds of amounts not less than $50.00 each, with interest, payable within 20 years after the final passage of the law authorizing such debt. A correct registration of all bonds shall be kept by the treasurer in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally made payable."

Defendant then offers in evidence section 3 of article 1 of the constitution, as follows, to wit: "Section 3. All political power is vested in and derived from the people only. Therefore they have the right at all times to modify their form of government in such manner as they may deem expedient, when the public good demands."

Defendant then offers in evidence section 41 of article 1 of the constitution of South Carolina, as follows, to wit: "The enumeration of rights in this constitution shall not be construed to impair
34 or deny others retained by the people, and all powers not herein delegated remain with the people."

Defendant then offers in evidence an act of the General Assembly of the State of South Carolina entitled "An act to abolish the office of State auditor, and to confer the duties of his office upon the comptroller general." Passed March 13th, 1872.

Defendant then offers in evidence an act of the General Assembly of the State of South Carolina approved October 22nd, 1873, entitled "An act to repeal section four (4) of an act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same, approved March 2nd, 1872, and to repeal so much of section 72, chapter 12, title three of the General Statutes as authorizes the State auditor to give notice annually to each county auditor of the rates per centum to be levied for various State purposes." This act repealed the section referred to.

Defendant then offers in evidence act of the General Assembly of the State of South Carolina approved the 22nd day of December, 1873, entitled "An act to raise supplies for the fiscal year commenc-

ing November 1, 1873, and to construe and amend the law relating to the collection of taxes."

Whereby section 11 provides that county auditors and county treasurers are forbidden to collect any taxes for the redemption of the said revenue bond scrip, and further providing that any State or county officer violating any of the provisions of said act shall be guilty of felony and punished as in the act provided.

35 And defendant then offers in evidence the written contract between himself and the plaintiff for the purchase of the property in question, a copy of which is hereto attached, marked "Exhibit B," and made a part of this stipulation.

The defendant also offers in evidence a copy of one of the bonds of the Blue Ridge Railroad Company referred to in the act of the third of March, 1872, herein mentioned (all of said bonds being similar), which is hereto attached, marked "Exhibit C," and made a part hereof.

The defendant also offers in evidence copies of the revenue bond scrip referred to in the pleadings in this cause, which are hereto attached and marked respectively "Exhibit D," "Exhibit E," and "Exhibit F," and made parts hereof.

It is admitted by the parties hereto that the plaintiff's right to the possession of the premises in said original bill described has been disputed by the State of South Carolina and its officers and employees, and that they have endeavored to keep him out of the possession thereof, but that the plaintiff's right to the immediate possession thereof has been established by decree of the United States Supreme Court in the case of J. E. Tindal and J. R. Boyles, plaintiffs in error, *v.* Edward B. Wesley, defendant in error, October term, 1896, to be found, probably, in 167 U. S. Rep.; also by the circuit court of appeals of the United States for the fourth circuit, sitting at Richmond, in a cause entitled "*Ex parte* Samuel W. Vance, petitioner, plaintiff in error, *v.* Edward B. Wesley, respondent, defendant in error; in case of Edward B. Wesley, plaintiff, *v.* J. E. Tindal and J. R. Boyles, defendants," and that plaintiff is ready to deliver the possession of the property.

36 (EXHIBIT C.)

(*Copy of Bond of the Blue Ridge Railroad Company.*)

UNITED STATES OF AMERICA.

Guaranteed by the State of South Carolina under acts of 1854 and 1868.

$1,000 in United States gold coin or £200 British sterling.

No. 1. *Mortgage Loan*, $4,000,000. No. 1.

The Blue Ridge Railroad Company,

Comprehending the "Blue Ridge Railroad Company" in South Carolina, the "Blue Ridge Railroad Company" in Georgia, the "Tennessee River Railroad Company" in North Carolina, the "Knoxville and Charleston Railroad Company" in Tennessee, and the "Pendleton Railroad Company" in South Carolina, and extending by its connections from Charleston, South Carolina, to Knoxville, Tennessee.

Whereas, the General Assembly of South Carolina, by an act passed on the twenty-first day of December, eighteen hundred and fifty-four, entitled An act to authorize aid to the "Blue Ridge Railroad Company in South Carolina," provided that the faith and funds of the State of South Carolina be, and the same are hereby pledged to secure the punctual payment of any contracts which shall be made for borrowing money by the "Blue Ridge Railroad Company in South Carolina," from any persons, companies or corporations, to any amount not exceeding one million of dollars; and when such contracts shall be made by bond or bonds, signed by the president of the company, under its seal, and countersigned by the secretary or treasurer thereof, it shall be the duty of the comptroller general to endorse thereon that the faith and funds of the State are pledged to the faithful performance of said contract or contracts, as it respects the punctual payment both of the principal and interest, according to the terms of said contract or contracts: Provided, that certain conditions particularly recited in section seven of said act be first executed, and the several companies above mentioned secure the said endorsement by a mortgage of all their property in the States of South Carolina, Georgia, North Carolina, and Tennessee, duly executed and recorded:

37 And whereas, by another act of the General Assembly of South Carolina, approved on the sixteenth day of September, eighteen hundred and sixty-eight, the said conditions recited in the seventh section of the first mentioned act have been released, and it is enacted that without reference to the said provisos and conditions, whenever any contract may be made by the president of said company under its seal, and as provided by said act, and not exceeding four million of dollars, it shall be the duty of the comptroller general to endorse thereon that the faith and funds of the State are

pledged to the faithful performance of said contract or contracts, as respects the punctual payment both of the principal and interest, according to the terms of said contract or contracts:

And whereas, a mortgage hath been duly executed by the several companies before named, to secure said four million loan, and this bond is one among those protected thereby,

Now, know all men by these presents, that the Blue Ridge Railway Company, in South Carolina, will pay to the holder of this bond, on presentation of the same, at either of the agencies of said company, in New York, Charleston, or London, at the expiration of twenty years from the date hereof, one thousand dollars in American gold coin, if presented at either of the agencies in the United States, or two hundred pounds sterling at the agency in London, at the option of the holder, interest thereon to be paid semi-annually, at the rate of seven per cent. per annum, on the first day of January and July of each year, at either of the above agencies, upon presentation of the annexed coupons or warrants for thirty-five dollars American gold coin, if presented at either of the agencies in the United States, or seven pounds sterling in London, each at option of the holder.

In testimony whereof the said company has hereunto caused to be affixed its corporate seal and these presents to be subscribed by its president and countersigned by its secretary this first day of July, 1869.

J. W. HARRISON, *President.*

W. H. D. GAILLARD, *Secretary.*

[CORPORATE SEAL.]

(Indorsements.)

We, Henry Clews, of the city of New York, and Henry Gourdin and George S. Cameron, of the city of Charleston, S. C., hereby certify that the Blue Ridge Railroad Company in South Carolina and the several railroad companies herein named have executed to us a deed of trust or mortgage, purporting to convey their several roads and their appurtenances, with all the rights and franchises, property, and privileges of said companies, as specified in the instrument, in trust for the benefit of the holders of the bonds of the Blue Ridge Railroad Company in South Carolina, of similar tenor as the foregoing, to an amount not exceeding in all four million dollars, with power to take possession of, use, or sell the same or any part
38 thereof after a default in paying the interest or principal of the said bonds or any of them, and that the foregoing is one of the several bonds described in and secured by said deed or mortgage; and that we have caused the said deed to be recorded in the proper offices of the States of "South Carolina," "Georgia," "North Carolina," and "Tennessee."

HENRY CLEWS,
H. GOURDIN,
GEO. S. CAMERON,
Trustees.

COMPTROLLER GENERAL'S OFFICE,
COLUMBIA, S. C., *May 2d, A. D.* 1870.

Whereas by acts of the General Assembly of the State of South Carolina passed on the twenty-first day of December, eighteen hundred and fifty-four, and the sixteenth day of September, eighteen hundred and sixty-eight, respectively, the comptroller general is authorized and directed to endorse the guarantee of the State upon the bonds of the Blue Ridge Railroad Company in South Carolina:

Now, therefore, I, J. L. Neagle, comptroller general of the State of South Carolina, by virtue of the authority vested in me by the acts aforesaid, do hereby endorse this bond and pledge the faith and funds of the State of South Carolina for the payment of the principal of the within bond and the interest that may accrue thereon as therein stipulated.

In testimony whereof I have hereunto set my hand as comptroller general on the day and date above written.

J. L. NEAGLE,
Comptroller General.

39 (*Copies of Revenue Bond Scrip.*)

(EXHIBIT D.)

"Original scrip."

(Upper margin.)

One hundred dollars. One hundred dollars.

(Left margin.)

One hundred dollars.

Act March, 1872.

(Right margin.)

One hundred dollars.

Act March, 1872.

(Lower margin.)

One hundred dollars. One hundred dollars.

(Body.)

$100. No. 21. $100.

Revenue Bond Scrip.

(Palmetto tree.)

THE STATE OF SOUTH CAROLINA,
COLUMBIA, S. C., *March* —, 1872.

Receivable as one hundred dollars in payment of all taxes and dues to the State, except special tax levied to pay interest on public debt.

NILES G. PARKER,
State Treasurer.

40 (EXHIBIT E.)

Washington scrip.

(Top margin.)

Ten Ten Ten. Revenue bond scrip. Ten Ten Ten.

(Left margin.)

Ten Ten Ten Ten Ten Ten Ten.

Vignette.

(Right margin.)

Ten Ten Ten Ten Ten Ten Ten.

(Lower margin.)

Ten Ten Ten. Act March 2, 1872. Ten Ten Ten.

(Body.)

No. 8661. STATE OF SOUTH CAROLINA. X.

10. COLUMBIA, S. C., *March* 2, 1872.

Receivable as ten dollars in payment of all taxes and dues of the State, except special tax levied to pay interest on public debt.

NILES G. PARKER,
State Treasurer.

41 (EXHIBIT F.)

(Top margin.)

Five Five Five. Revenue bond scrip. Five Five Five.

(Left margin.)

Five Five Five Five Five Five.

Vignette.

(Right margin.)

Five Five Five Five Five Five.

(Lower margin.)

Five Five Five. Act March 2, 1872. Five Five Five.

(Body.)

No. 5468. STATE OF SOUTH CAROLINA. 5.

5. COLUMBIA, S. C., *March* 2, 1872.

Receivable as five dollars in payment of all taxes and dues of the State, except special tax levied to pay interest on public debt.

NILES G. PARKER,
State Treasurer.

(Endorsed.)

(Left margin.)

Five.

(Right margin.)

Five.

(Body.)

Issued under an act to relieve the State of South Carolina of all liability for its guarantee of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same. March 2, 1872.

42 (EXHIBIT B.)

THE STATE OF NEW YORK:

This memorandum, executed in duplicate and interchangeably delivered, between Edward B. Wesley, a citizen of the State of New York, of the first part, and Howard P. Eells, a citizen of the State of Ohio, of the second part, witnesseth:

That the party of the first part hereby agrees to sell and convey to the party of the second part, at the price of twenty thousand dollars, all that lot, piece or parcel of land situate in the city of Columbia, and State of South Carolina, containing one-quarter of an acre, more or less, with the buildings and improvements thereon known as "Agricultural Hall" (formerly known as Parker's Hall) bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street, and on the south and west by lands now or formerly of Jacob C. Lyons; said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated the 3rd day of May A. D. 1875, and recorded in Book K. of Deeds, pp. 106 and 107; also, all that certain parcel or lot of land situate, lying and being in the city of Columbia, and State aforesaid, containing about one-eighth of an acre of land, bounded north by the Agricultural Hall building and lot immediately in rear thereof, east by Richardson street, south by lot now or formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker; said lot being a rectangular parallelogram in shape and measuring on Richardson street from the southeastern corner of the said Parker block building south twenty-six feet, and from east to west two hundred and eight feet; the said lot also adjoining a part of the Agricultural Hall block and being the same lot of land
43 formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11, 1875, and recorded in R. M. C. conveyance office for Richland county, in Book K. of Deeds, pp. 319 and 320; the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston, dated April 9th, 1883, and recorded in the R. M. C. office in Book P. of Deeds, &c., p. 87; which premises were

afterwards conveyed to J. W. Alexander by the commissioners of the sinking fund of the State of South Carolina, and by J. W. Alexander afterwards conveyed to the undersigned, Edward B. Wesley; five thousand dollars of the purchase-money thereof to — paid in cash, and the balance secured by a bond and mortgage of the party of the second part, to be payable in four (4) equal annual installments, with interest from the date of the conveyance, at the rate of six (6) per centum per annum.

The party of the first part covenants and agrees, and this contract is made upon condition that the party of the first part is the owner in fee-simple of said premises, and that the same are, at the date of this contract, free from any valid or subsisting lien or encumbrance thereon.

Said Howard P. Eells, the party of the second part, agrees to purchase the said premises at the price and upon the terms stated, upon condition that the party of the first part is now seized of the said premises in fee, and that there is no valid or subsisting lien or encumbrance thereon.

In witness whereof, said parties have subscribed this memo-
44 randum, and interchangeably delivered the same this — day of October, 1897.

(Signed) EDWARD B. WESLEY.
HOWARD P. EELLS.

Witness:

—— ——.

Witness to H. P. E.:

—— ——.

45 *Exhibit Act Set Forth in Brief of Argument Williams vs. Hagood, Heretofore Referred to in Agreement to Submit and Memo. of Documentary Evidence.*

The act is as follows (Laws of South Carolina, 15th vol., p. 79):

"An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same.

Whereas, the State of South Carolina has, by and in pursuance of the provisions of an act approved the fifteenth day of September, A. D. 1868, entitled 'An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina,' indorsed a guaranty of the faith and credit of the State on four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, comprehending the Blue Ridge Railroad Company in South Carolina; the Blue Ridge Railroad Company in Georgia; the Tennessee River Railroad Company in North Carolina; the Knoxville & Charleston Railroad Company in Tennessee, and the Pendleton Railroad Company in South Carolina, for the purpose of aiding the speedy completion of the said railroad, which bonds are liable for the debts of the said railroad companies; and whereas, the present condition of the finances of the State and of said companies *are* such as to make

the further continuance of said bonds on the market inexpedient and unadvisable, and a serious injury and prejudice to the credit of the State; and whereas, the existence of the said four millions of dollars of bonds, so guaranteed, creates a large liability upon the part of the State, which the treasurer may be required to meet at unforeseen and inopportune times; and whereas, the liability of the State, on account of such guaranty, should be faithfully met and discharged; therefore, in order to secure the recovery and destruction of the bonds and coupons of the said company, issued under
46 and in pursuance of the provisions of the aforesaid act, now pledged in the city of New York and elsewhere, and to relieve the State of all liabilities, whatsoever, by reason of its indorsement and guaranty of said bonds:

SEC. 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by authority of the same, that the State treasurer is hereby directed, with the consent, in writing, of the president of the Blue Ridge Railroad Company, in South Carolina, to require the financial agent of the State, in the city of New York, immediately to deliver to the State treasurer all the bonds of the Blue Ridge Railroad Company, indorsed and guaranteed by the State of South Carolina, which are now in his possession, and held by him as collateral security for advances made by the said financial agent, by the order of the financial board to the Blue Ridge Railroad Company; and upon the delivery of said bonds the treasurer is hereby required to cancel the same in the manner hereinafter directed; and the said Blue Ridge Railroad Company shall thereupon be discharged from all liability to the State on account of such advances.

SEC. 2. That upon the surrender by the said company to the State treasurer, of the balance of the said four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, and guaranteed by the State, the State treasurer is hereby authorized and required to deliver to the president of the Blue Ridge Railroad Company, in South Carolina, treasury certificates of indebtedness (style revenue bond scrip), to the amount of one million eight hundred thousand dollars, the said certificates to be executed in the manner
47 hereinafter directed; and if the said company shall not be able to deliver all of said bonds at one time, the treasurer is authorized and required to deliver to the said president such amount of such treasury certificates as shall be proportioned to the amount of bonds delivered.

SEC. 3. That to carry out the purposes of this act, the State treasurer is hereby authorized and required to have printed, or engraved on steel, as soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the State of South Carolina, in such form and of such denomination as may be determined on by the State treasurer and the president of the Blue Ridge Railroad Company, in South Carolina, to the amount of one million eight hundred thousand dollars; which revenue bond scrip shall be signed by the State treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the

bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

SEC. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in special payment of special taxes levied to pay interest on the public debt; and the State treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and, still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the as-
48 sessed value of all taxable property in the State, is hereby levied, to be collected in the same manner, and at the same time, as may be provided by law for the levy and collection of the regular annual taxes of the State; and the State treasurer is hereby required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip hereby authorized to be issued until all of it shall be retired, and *and* to apply to such purpose exclusively the taxes hereby required to be levied.

SEC. 5. That if any such revenue bond scrip is received in the treasury for the payment of taxes, the treasurer be, and he is hereby authorized to pay out such revenue bond scrip in satisfaction of any claims against the treasury, except for interest that may be due on the public debt.

SEC. 6. That upon the delivery to the State treasurer of the said guaranteed bonds of the Blue Ridge Railroad Company, or of any part of them, the treasurer is hereby required to cause the same to be cancelled and destroyed, in the presence of the president of the Blue Ridge Railroad Company, in South Carolina, and in the presence of a joint committee of the senate and house of representatives of this State, to be for that purpose appointed.

SEC. 7. That whenever the whole number of the said guaranteed bonds shall have been delivered to the treasurer as cancelled, as required by the provisions of this act, the lien of the State of South Carolina upon the estate, property and funds of the said Blue Ridge Railroad Company, in this State, and of the other associated companies in the States of Georgia, North Carolina and Tennessee, as secured by the provisions of an act entitled 'An act to authorize additional aid to the Blue Ridge Railroad Company, in South
49 Carolina,' passed on the fifteenth day of September, anno Domini one thousand eight hundred and sixty-eight, and all other claims or liens which are held by the State against said company or companies, on account of said guaranty, shall, from henceforth, be forever discharged and released; and should the said company be unable, from any cause, to deliver all of said bonds, such liens shall be discharged and released to an extent which shall be proportional to the amount of such bonds actually delivered.

SEC. 8. That if the said company shall accept the provisions of this act, it shall be authorized, if the board of directors may desire, to change the corporate name of the company to that of the 'Knox-

ville & South Carolina Railroad Company,' and shall have power to extend its railroad, or to construct branches thereof, to any points *are* places in this State, with all the powers and privileges with which the said company is now vested by the provisions of its charter; and the said company shall have power to issue bonds and to secure the same by a mortgage, to such amount and in such manner as the board of directors may direct. And all sales of stock in the said Blue Ridge Railroad Company, in South Carolina, and its associate companies, formerly held by the State and sold by the commissioners of the sinking fund, be and they are hereby confirmed.

SEC. 9. That if any person shall forge or counterfeit the treasury scrip hereby authorized to be issued, or shall directly or indirectly aid or assist in the forging or counterfeiting of such scrip, or shall issue, or in any manner use any such forged or counterfeited scrip, he shall, on conviction thereof, be fined, in the discretion of the court, and shall be imprisoned in the penitentiary for a term not exceeding ten years."

50 Endorsements on agreement to submit: 5734. Edward B. Wesley *vs.* Howard P. Eells. Agreement to submit. Filed Feb. 5th, 1898. Irvin Belford, clerk U. S. circuit court, N. D. O.

51 *Order of Continuance.*

February Term, A. D. 1898, to wit, April 4th, 1898.

Present: Honorable Augustus J. Ricks, United States district judge.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS. } # 5734. Chancery.

This cause is continued to the next term of this court.

Order of Continuance.

April Term, A. D. 1898, to wit, September 29th, 1898.

Present: Honorable E. S. Hammond, U. S. dist. judge, sitting by designation, and Augustus J. Ricks, U. S. dist. judge.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS. } # 5734. Chancery.

This cause is continued to the next term of this court.

52 *Opinion of the Court.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

EDWARD B. WESLEY
vs.
HOWARD P. EELS.

This is an action to enforce the specific performance of an admitted contract between complainant and defendant for the sale and purchase by them respectively of certain property known as Agricultural Hall, located in the city of Columbia, South Carolina.

On December 24, 1890, the State of South Carolina being the owner of said Agricultural Hall property, the General Assembly of that State passed an act providing for the sale of said property by the commissioners of the sinking fund of the State of South Carolina. Pursuant to that act the property was sold at public auction on February 2, 1892, and was bid in by the complainant, by his attorney, for the sum of $16,165.00.

By the terms of sale the purchaser was required to pay in cash one-third of the purchase price, and to execute his bond and mortgage of the premises to secure the balance of the purchase price, in two equal annual installments, with interest from the date of sale, the obligor to have the option of paying the whole or any part of the indebtedness so to be secured at any time before its maturity.

Complainant caused the deed for the premises to be made to one J. W. Alexander, who consented to act as trustee for him for the purchase of the premises, and the deed was duly executed and delivered by the commissioners of the sinking fund to Alexander in fee-simple without a declaration of the trust. Alexander executed and delivered to the treasurer of the State of South Carolina his bond in the penal sum of $21,553.34, conditioned for the pay-
53 ment of $10,776.67 in two equal annual installments from the date of the bond, with interest payable annually. It was provided in the bond that Alexander should have the privilege of paying the whole or any part of the amount secured by the bond before maturity. The bond and mortgage and deed of conveyance were dated the 2nd of February, 1892, the day of sale.

On the 16th day of February, 1892, complainant Wesley, being the owner and holder of a large amount of revenue bond scrip of the State of South Carolina, furnished to the said Alexander an amount thereof which at its par value was more than sufficient to cover the amount due the State of South Carolina on said bond and mortgage, and Alexander, through his attorneys, exercising the power given him by the terms and conditions of his bond to the State, duly tendered to W. T. C. Bates, State treasurer of South Carolina, the full amount due thereon, including interest. Bates had the custody and possession of the bond and mortgage and was the officer designated by law to receive the amount of the bond and

mortgage, he being the obligee named in the bond. The tender was refused.

By the laws of South Carolina a tender in full of the amount of money due to a mortgagee secured by a mortgage of personal or real property at any time when the mortgagor has a right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage securing the payment of such money, whether the amount so tendered be accepted or not and whether the mortgagor shall keep himself in position to make good the tender or not.

Salinas *vs.* Ellis, 26 S. C., 337.

After tender was made by Alexander the State treasurer caused the mortgage given by Alexander to be filed for record in the office of the register of mesne conveyances for Richland county, South Carolina. The mortgage still stands of record unsatisfied.

On February 15, 1893, Alexander conveyed said Agri-
54 cultural Hall property to complainant at his request.

In October, 1897, complainant entered into a contract with Howard P. Eels, defendant herein, whereby he agreed to convey said Agricultural Hall property to said Eels, free from any valid lien or encumbrance whatever, at and for the price of twenty thousand dollars in cash. The premises are now and were at the time of making the contract of the value of twenty thousand dollars. Complainant is ready and willing to deliver to defendant a good and sufficient deed in law to convey the said premises to him in fee-simple. Defendant refuses to receive said deed and pay the purchase price, contending that the revenue bond scrip tendered by Alexander in payment of the amount due on the bond and mortgage was not a valid obligation of the State of South Carolina, and consequently did not constitute a legal tender for the debt and did not operate as an extinguishment of the lien of the mortgage. There are no other liens upon said property except some unentered taxes due the State of South Carolina, which amount complainant is willing that defendant retain out of the purchase price of the premises when ascertained.

It is admitted that if the revenue bond scrip tendered by Alexander was valid and receivable for dues to the State of South Carolina the lien of the mortgage was extinguished by its tender; but defendant claims that the revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the State of South Carolina, and that its tender was a mere nullity.

By an act of the General Assembly of South Carolina passed September 15, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," the State, by a guaranty endorsed thereon, pledged its faith and funds to the payment of the principal and interest of the bonds to be issued by the railroad company to the amount of $4,000,000. The bonds authorized by the act, with the guaranty endorsed, were issued.

55 On March 2, 1872, an act of the General Assembly of South Carolina authorizing the issue of the revenue bond

scrip tendered in payment of the mortgage given by Alexander to the State of South Carolina was passed and is as follows:

An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same.

Whereas, the State of South Carolina has, by and in pursuance of the provisions of an act approved the fifteenth day of September, A. D. 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," endorsed a guaranty of the faith and credit of the State on four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, comprehending the Blue Ridge Railroad Company in South Carolina; the Blue Ridge Railroad Company in Georgia; the Tennessee River Railroad Company in North Carolina; the Knoxville and Charleston Railroad Company in Tennessee, and the Pendleton Railroad Company in South Carolina, for the purpose of aiding the speedy completion of the said railroad, which bonds are liable for the debts of the said railroad companies; and whereas the present condition of the finances of the State and of said companies are such as to make the further continuance of said bonds on the market inexpedient and unadvisable, and a serious injury and prejudice to the credit of the State; and whereas, the existence of the said four millions of dollars of bonds, so guaranteed, creates a large liability upon the part of the State, which the treasurer may be required to meet at unfor-seen and inopportune times; and whereas, the liability of the State on account of such guaranty, should be faithfully met and discharged; therefore, in order to secure the recovery and destruction of the bonds and coupons of the said company, issued under and in pursuance of the provisions of the aforesaid act, now
56 pledged in the city of New York and elsewhere, and to relieve the State of all liabilities, whatsoever by reason of its endorsement and guaranty of said bonds:

SEC. 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by authority of the same, that the State treasurer is hereby directed, with the consent, in writing, of the president of the Blue Ridge Railroad Company, in South Carolina, to require the financial agent of the State, in the city of New York, immediately to deliver to the State treasurer all the bonds of the Blue Ridge Railroad Company, indorsed and guaranteed by the State of South Carolina, which are now in his possession, and held by him as collateral security for advances made by the said financial agent, by the order of the financial board of the Blue Ridge Railroad Company; and upon the delivery of said bonds the treasurer is hereby required to cancel the same in the manner hereinafter directed; and the said Blue Ridge Railroad Company shall thereupon be discharged from all liability to the State on account of such advances.

SEC. 2. That upon the surrender by the said company to the State treasurer, of the balance of the said four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, and guaranteed

by the State, the State treasurer is hereby authorized and required to deliver to the president of the Blue Ridge Railroad Company, in South Carolina, treasury certificates of indebtedness (styled revenue bond scrip), to the amount of one million eight hundred thousand dollars, the said certificates to be executed in the manner hereinafter directed; and if the said company shall not be able to deliver all of said bonds at one time, the treasurer is authorized and required to deliver to the said president such amount of such treasury certificates as shall be proportioned to the amount of bonds delivered.

57 SEC. 3. That to carry out the purposes of this act, the State treasurer is hereby authorized and required to have printed, or engraved on steel, as soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the State of South Carolina, in such form and of such denomination as may be determined on by the State treasurer and the president of the Blue Ridge Railroad Company, in South Carolina to the amount of one million eight hundred thousand dollars; which revenue bond scrip shall be signed by the State treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

SEC. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in special payment of special taxes levied to pay interest on the public debt; and the State treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and, still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected in the same manner, and at the same time, as may be provided by law for the levy and collection of the regular annual taxes of the State and the State treasurer is hereby required to retire at the end of each year from their date, one-fourth of the amount of the treasurer's scrip hereby authorized to be issued until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

SEC. 5. That if any such revenue bond scrip is received in
58 the treasury for the payment of taxes, the treasurer be, and he is hereby authorized to pay out such revenue bond scrip in satisfaction of any claims against the treasury, except for interest that may be due on the public debt.

SEC. 6. That upon the delivery to the State treasurer of the said guaranteed bonds of the Blue Ridge Railroad Company, or of any part of them, the treasurer is hereby required to cause the same to be cancelled and destroyed, in the presence of the president of the Blue Ridge Railroad Company, in South Carolina, and in the presence of a joint committee of the senate and house of representatives of this State, to be for that purpose appointed.

SEC. 7. That whenever the whole number of the said guarantee bonds shall have been delivered to the treasurer as cancelled, as required by the provisions of this act, the lien of the State of South Carolina upon the estate, property and funds of the said Blue Ridge Railroad Company, in this State, and of the other associated companies in the States of Georgia, North Carolina and Tennessee, as secured by the provisions of an act entitled "An act to authorize additional aid to the Blue Ridge Railroad Company, in South Carolina," passed on the fifteenth day of September, anno Domini one thousand eight hundred and sixty-eight, and all other claims or liens which are held by the State against said company or companies, on account of said guaranty, shall, from thenceforth, be forever discharged and released; and should the said company be unable, from any cause to deliver all of said bonds, such liens shall be discharged and released to an extent which shall be proportional to the amount of such bonds actually delivered.

SEC. 8. That if the said company shall accept the provisions of this act, it shall be authorized, if the board of directors may desire, to change the corporate name of the company to that of the "Knoxville & South Carolina Railroad Company," and shall have power to extend its railroad, or to construct branches thereof, to any
59 points or places in this State, with all the powers and privileges with which the said company is now vested by the provisions of its charter; and the said company shall have power to issue bonds and to secure the same by a mortgage, to such amount and in such manner as the board of directors may direct. And all sales of stock in the said Blue Ridge Railroad Company, in South Carolina, and its associate companies, formerly held by the State and sold by the commissioners of the sinking fund, be and they are hereby confirmed.

SEC. 9. That if any person shall forge or counterfeit the treasury scrip hereby authorized to be issued, or shall directly or indirectly aid or assist in the forging or counterfeiting of such scrip, or shall issue, or in any manner use any such forged or counterfeited scrip, he shall, on conviction thereof, be fined, in the discretion of the court, and shall be imprisoned in the penitentiary for a term not exceeding ten years.

The revenue bond scrip issued pursuant to this act was of different denominations, varying from $1 to $5,000, and was in the form following:

$100.00 No. 21. $100.00

Revenue Bond Scrip.

THE STATE OF (Palmetto Tree) SOUTH CAROLINA.

COLUMBIA, S. C., *March* —, 1872.

Receivable as one hundred dollars in payment of all taxes and dues to the State, except special tax levied to pay interest on public debt.

NILES G. PARKER,
State Treasurer.

One hundred dollars. One hundred dollars.

(On each side of scrip:) One hundred dollars, act March, 1872

The exchange contemplated by this act was effected; individuals holding the guaranteed bonds as collateral security for loans of money to the railroad company surrendered them and accepted in lieu thereof revenue bond scrip at the lower rate. Complainant Wesley advanced the sum of three hundred and forty-four
60 thousand nine hundred and twenty-five dollars in cash, and with that sum redeemed two millions nine hundred and two thousand dollars of the said Blue Ridge Railroad bonds, with all their coupons attached, and delivered the same to the treasurer of the State of South Carolina, and the said bonds and attached coupons were mutilated and cancelled in accordance with the provisions of said act. Wesley received from the State treasurer of South Carolina one million five thousand dollars of the said revenue bond scrip.

After the exchange of guaranteed bonds for scrip was made the legislature of South Carolina passed an act on March 13, 1872, abolishing the office of State auditor and vested his powers in the comptroller general. By an act passed October 22, 1873, the fourth section of the act of March 2, 1872, providing for an annual tax of three mills on the dollar for the redemption of the revenue bond scrip, was repealed. The act also forbade the comptroller general to levy any tax whatever, unless expressly thereafter authorized to do so by statute. On December 22, 1873, an act was passed forbidding any State or county officer to accept payment of taxes in revenue bond scrip, and forbids the collection of taxes to redeem said revenue bond scrip. The provision in the act of March 2, 1872, that the scrip should be received in payment of dues to the State has never been repealed.

This South Carolina revenue bond scrip has twice been held to be bills of credit by the supreme court of South Carolina in the cases of State *ex rel.* Shiver *vs.* Comptrolier General, 4 S. C., 185, and Auditor *vs.* Treasurer, 4 S. C., 311.

To this judgment no holder of the revenue bond scrip was a party and are not concluded thereby.

Hagood *vs.* Southern, 117 U. S., 52.

This scrip has also been before the Supreme Court of the United States three times. The decision in the first two cases was adverse to the holders of the scrip, upon the grounds that the actions
61 were suits against the State of South Carolina without their consent, and were dismissed without prejudice to a new action.

Williams *vs.* Hagood, 98 U. S., 72.
Hagood *vs.* Southern, 117 U. S., 52.

The holding in the other one was in favor of the complainant in this case, the decision being that he was entitled to the possession of the property which is the subject of this suit.

Tindal *vs.* Wesley, 167 U. S., 204.

But the question of the violation of the Constitution of the United States or of the State of South Carolina was not passed upon in either of these cases.

Defendant asserts that the revenue bond scrip of South Carolina was issued in violation of the constitution of South Carolina, which provides, art. IX, sec. 7, that public debts may be contracted for the purpose of defraying extraordinary expenditures; sec. 10, that no scrip, certificate, or other evidence of State indebtedness shall be issued except for the redemption of stock, bonds, or other evidence of indebtedness previously issued; and sec. 14, that any debt contracted by the State shall be by loan on State bonds of amounts not less than $50 each, on interest, payable within twenty years after the final passage of the law authorizing such debts. He avers that the guaranty of the State of the original bonds of the Blue Ridge Railroad Company was illegal and void because made in violation of express statutory conditions, which *was* never repealed, and that as a consequence the revenue bond scrip was without consideration, which, appearing on the face of the law itself, deprived the certificates of all validity, in whatever hands they might be found. Defendant also contends that the revenue bond scrip is void as being in violation of the provision of the Constitution of the United States, art. I, section 10, which declares that no State shall emit bills of credit, and that these certificates, on the face of the
62 instrument and the law creating it, appear manifestly designed to circulate as money in the ordinary transactions of business.

Are these certificates bill- of credit within the meaning of the United States Constitution?

In the case of Poindexter *vs.* Greenhow, 114 U. S., at page 283, the Supreme Court say:

The meaning of the term "bills of credit" as used in the Constitution has been settled by decisions of this court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States and in view of the great public and private mischiefs experienced during and prior to the period of the war of independence in consequence of unrestrained issues by the colonial and State governments of paper

money based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests. Accordingly Chief Justice Marshall, in Craig *vs.* Missouri, 4 Pet., 410, 432, said that "bills of credit signify a paper medium *medium* intended to circulate between individuals and between government and individuals for the ordinary purposes of society." This definition was made more exact, by merely expressing, however, its implications, in Briscoe *vs.* The Bank of Kentucky, 11 Pet., 257, 314, where it was said: "The definition, then, which does include all classes of bills of credit emitted by the colonies or States is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money." And again, p. 318: "To constitute a bill of credit within the Constitution it must be issued by a State, on the faith of the State, and be designed to circulate as
63 money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life." The definition was repeated in Darrington *v.* The Bank of Alabama, 13 How., 12.

A paper, then, which is a bill of credit has three essentials: 1, it must be issued by a State in its sover-ign character; 2, it must contain a pledge of the faith of the State; 3, it must be designed to circulate as money.

There can be no serious dispute that the first two requirements are clearly established by the act itself. Section 3 provides for a paper to be issued by the State treasurer and be signed by him, expressing that the amount named therein is due to the bearer from the State of South Carolina. By section 4 the faith and funds of the State are pledged for its ultimate redemption.

It remains to be determined whether this scrip was intended to circulate as money.

The opinion of the supreme court of South Carolina in the case of State *ex rel.* Siver *vs.* Comptroller General, 4 S. C., 185, and the opinion of Judge Willard, of the supreme court of South Carolina, on circuit, in the cases of Garry *vs.* Parker, treasurer, and Dupre *vs.* County Treasurer, which cases were affirmed by the supreme court of South Carolina in 4 S. C., 311, discuss the question as to whether this scrip was intended to pass as currency or a circulating medium. These opinions make it quite clear that the legislature intended that the scrip should circulate between the State government and the people as money.

The supreme court of South Carolina, in passing upon the validity of this scrip, speaking through Chief Justice Moses, gives its reasons for holding them to be bills of credit, as follows:

"The argument which holds it valid as a subsisting obligation and repels the character of a bill of credit, under which it is
64 classed by the respondent, seems to rest upon the fact that it was not designed to circulate as money. The opinion of

Mr. Justice Willard in State *ex rel.* Garry *vs.* Parker, treasurer, and Dupre *vs.* County Treasurer, which was brought to our notice in the case before us and which will be reported with it, is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community like money that it is to be held a bill of credit, nor does the fact of currency so constitute it. A State might well make the coupons attached to its bonds receivable for taxes without subjecting them to the disabilities of bills of credit, as used in the Constitution, even although they might readily pass in payment of debts or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope of the act, the emission is a bill of credit within the terms of the Constitution. To the many indications in the act to show the intended design, which have been pointed out in the opinion of Justice Willard, it might be added that the revenue bond scrip could never have been intended or proposed as a State security for investment, because it bore no interest and its value consisted in the fact of its ready capacity and facility in supplying all articles necessary for use or consumption. Its capacity for circulation and its easy convertibility, together with its adaptation to immediate and ready use, would cause a demand for it which a State bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the State, the purpose was to furnish a fund for payment and not a circulating medium. But cannot the two coexist? May not the medium of payment be of such a kind and character as to create in itself a circulating medium? It is not the end which the assumption is to accomplish, but the
65 mode and manner designed and the use contemplated. The State might issue certificates of indebtedness for the redemption of its bonded debt; but if it did so in the form and manner and design proposed by the act of March 2nd, 1872, would they be less obnoxious to the objection urged against the revenue bond scrip because they were issued to pay or meet a debt? It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach to it as a provision and recommendation for a circulating medium."

State *ex rel.* Shiver *vs.* Comptroller General, 4 S. C., at page 228.

So much of the opinion of Justice Willard (to which reference is made in the foregoing opinion of the supreme court of South Carolina and whose reasoning they adopted) as bears upon the question whether this scrip was intended for circulation as money follows:

"There are certain characteristics that tend to adapt a paper expressing a promise to pay money or representing money value to become current in the community as money. It must be in a form convenient to pass from hand to hand. It must be based either on the credit of a government, a corporation, or an individual or an association of individuals, or upon a fund pledged or set apart for

its redemption. It must either have undoubted credit, such as arises from its ready convertibility into money value, or it must tend to supply some want, natural or artificial, of the community in which it is intended for circulation. It must be placed upon the community in quantity or volume sufficient to create an adequate interest and motive to secure its currency; and, finally, it must have a certain denominational character adjusted to the wants of the community in respect to a circulating medium.

"An examination of the act in question will disclose a clear intent to clothe the obligations in question with attributes fitting them for general circulation as money. These attributes will be considered in the order just stated.

66 "1st. Was it intended that the revenue bond scrip should be issued in a form convenient to pass from hand to hand in ordinary transactions of the community?

"Section 3 gives to the scrip the form most usual and convenient to serve as paper money, viz., that of the usual bank or treasury note. It is to be printed or engraved on steel in such form and of such denominations as the State treasurer and the president of the Blue Ridge Railroad Company shall determine. The — of referring this authority as to form and denomination to the treasurer and the president of the railroad company is obvious. The treasurer is, by the act, to receive and pay out this scrip from the treasury as money, and the president of the railroad company is to receive the scrip as the representative of his company and to realize from its employment, and they are most likely to know what qualities as to form and denomination would have the tendency to give the greatest currency to the scrip at the time of its issue. A certain discretion is left with them for such purpose. While the third section determines what shall be the substantial character of the scrip as importing a pledge of the public faith and credit, the form of the instrument, as adapting it in external appearance to the common notion of money, is left with those most concerned with its currency.

"2nd. It is to be based, by the terms of the act, on the credit of the State government in its sovereign capacity.

"3rd. The act attempts to confer upon it only the full credit capable of being conferred by the use of the full faith and credit of the State, but to create an artificial want in the community, tending to give it currency. In the first place, it is made receivable in payment of taxes and all other dues to the State except the special tax levied to pay interest on the public debt (sec. 3). Again, it is provided that if any such scrip is received in the treasury for the payment of taxes the treasurer is authorized to pay out the same

67 in satisfaction of any claim against the treasury except interest that may be due on the public debt (sec. 5).

"These provisions contain two distinct features. The first is a permissive feature, affecting each individual in the community who is a tax-payer and supplying to him a motive to become a purchaser of the scrip. A more energetic means of creating an interest and motive in the community to deal with the scrip as money could not be afforded short of making the scrip compulsory pay-

ment of all debts as between individuals. The other feature involves the communication to the scrip of the capacity of performing all the functions of money in all dealings between State and individuals, excepting only the payment of interest on the public debt. This last feature can have no other significance than that of giving currency to the scrip as money.

"It will be observed from the language of the fourth section, in which the faith and funds of the State are pledged, that such is not in terms that such scrip shall be redeemed by the payment to the bearer on presentation of the amount of money called for by it, but the language is 'that the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip.'

"It is only ultimate redemption, not payment on demand, that is covered by this pledge. What is meant by ultimate redemption is made clear by the succeeding clauses of that section. It is provided that a certain tax shall be annually levied for the redemption of the scrip, and it is also provided that the State treasurer shall 'retire at the end of each year from their date one-fourth of the amount of the treasury scrip hereby authorized to be issued until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.' The effect of these provisions is that the holder of the scrip must not look to payment according to the tenor of his scrip, but must seek a market for its circulation under the influence of the pledge of faith and funds for
68 its ultimate redemption. In other words, an attempt is made to give currency to the issue, notwithstanding the absence of any intention or ability to redeem according to the tenor of the promise, by obtaining a credit with the community for the amount of scrip put in circulation on the strength of certain special provisions and a general pledge of the faith and funds of the State for its ultimate redemption.

"4th. The quantity or volume of the contemplated issue is such as tended to create a strong motive and interest in the community to keep the scrip in circulation as money. The amount, $1,800,000, as compared with the extent of the commercial transactions of the community on which that amount was intended to be placed, affords the clearest indication of an intention so to affect the interest of the community as to secure its circulation as money. It was to be placed at once in private hands as valid obligations on the part of the State. The various provisions of the act that looked to a distribution among the people preclude the idea that it was intended that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders. On the contrary, it was clearly intended for dispersion, and the magnitude of the interest in the hands of the first receivers of the scrip was sufficiently large to warrant the assumption that it would become thus diffused throughout the community.

"5th. As *it* regards its adaption in respect of denomination, we have already seen that authority was conferred on those most concerned with its circulation to adapt the issue in that respect to the

wants of the community. Such a provision shows additional evidence of an intent that the scrip should circulate as money.

"Considering the act in its entire aspect, as well as its integral parts, it is clear that the legislature intended that the scrip should circulate as money, and that for this reason the provisions of
69 the act authorizing the issue of scrip are in conflict with the prohibitions of the Constitution of the United States as to the emission of bills of credit by States."

In the case of Poindexter *vs.* Greenhow, 114 U. S., 270, it was urged that interest coupons attached to bonds of the State of Virginia were bills of credit. These coupons were payable to bearer, and were receivable at and after maturity for all taxes, debts, and demands due the State.

The Supreme Court, after reviewing the definition of bills of credit as established by prior decisions, held these coupons not to be bills of credit.

They say:

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes or a bank its bank notes—a circulating medium or paper currency—as a substitute for money; and there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is that they are made receivable in payment of taxes and other dues to the State. From this it is argued that they would obtain such a circulation from hand to hand as money as the demand for them, based upon such a quality, would naturally give; but this falls far short of their fitness for general circulation in the community as a representative and substitute for
70 money, in the common transactions of business, which is necessary to bring them within the constitutional provision against bills of credit. The notes of the Bank of Arkansas, which were the subject of controversy in Woodruff *vs.* Trapnall, 10 How., 190, were by law receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so, because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name and were obligations based on its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued

as and for money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

There are certain resemblances and several marked differences between the Virginia coupons which were held not to be bills of credit and the South Carolina bond scrip.

The coupons and the scrip are alike in that they are obligations and indebtedness of the State; they are receivable by the State treasurer in payment of taxes and other dues to the State, and their redemption is based upon the faith and credit of the State.

Their dissimilarity lies in the fact that the coupons are to be paid on a day certain, while the scrip is not payable at any particular time, but are only to be redeemed or retired from year to year. The coupons are receivable in payment of taxes and other dues to the State only at and after maturity, while the scrip may be used for these purposes from the date of its issue. The coupons are paid and retired when received by the State, but the scrip may be reissued from the State treasury as often as received in satisfaction of all claims against the State except for paying interest on the public debt.

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In deciding the Virginia coupons not to be bills of credit, the Supreme Court applied certain tests to determine whether they were intended to constitute a paper currency or circulating medium. Apply these tests to the South Carolina bond scrip:

The scrip are, on their face, bills receivable of the State of South Carolina.

In their form and nature they are like bank and treasury notes.

The terms of the law authorizing their issue show that they were intended for circulation between the government and the people as money by the power given to the State treasurer and the president of the railroad company to fix the amount of the scrip, which power was exercised so as to make the denomination as low as one dollar; by reason of them bearing no interest; by the provision as to the form of the scrip; the great volume of the issue; and the scrip being non-interest-bearing, its circulation was necessary to sustain its value.

They could be used for the payment of taxes and other dues to the State from the date of their issue, and before any part of them were required to be redeemed or retired.

The reasoning of the supreme court of South Carolina and of Justice Willard, quoted in this opinion, is so full and convincing that the court feels constrained to follow their decision. Looking at the South Carolina bond scrip in the light of these decisions and the opinion of the Supreme Court of the United States in the case of Poindexter *vs.* Greenhow, it is quite clear that

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they are bills of credit within the prohibition of the Constitution of the United States.

But the complainant urges that the redemption of the revenue bond scrip did not depend solely upon the good faith of the State, because, as between the State and the railroad company, it was in the power of the State to enforce its payment against the railroad company, and that consequently one of the essential elements going to make up the bill of credit is lacking. The case of Hagood *vs.* Southern, 117 U. S., 64, is cited in support of this contention. The Supreme Court in that case say: "As between the railroad company and the State, the former is primarily liable for any debts represented by the revenue bond scrip (the scrip before the court in this case) or for which it is held by others for security, and is bound to indemnify the State against loss on account of its suretyship."

It will be noted that the court does not hold the railroad company in any way remotely liable for the redemption of the scrip as between the holder and the company. The railroad company is a total stranger to the contract, and in no event has the holder of the scrip any recourse to the railroad company in the event of the failure of the State to redeem the scrip. The good faith of the State is the only pledge for the redemption of the scrip.

While the act authorizing the issue of the scrip provided a fund for its redemption raised by taxation, yet its payment out of that fund rests upon the faith of the State.

Darrington *vs.* Alabama, 13 How., 12.

The opinion of this court is that the South Carolina bond scrip issued under and in pursuance of the act of March 2, 1872, are bills of credit, within the prohibition of the Constitution of the United States, and therefore void.

The tender of the scrip by Alexander to the State treasurer of South Carolina was not a valid tender and did not operate
73 to extinguish the mortgage given by Alexander to the State.

The said Agricultural Hall property is still incumbered by the mortgage and complainant cannot give defendant a clear title to it. Complainant is not entitled to relief asked in the bill of complaint.

The conclusion we have arrived at makes it unnecessary to determine the question of the violation of the constitution of South Carolina in the enactment of the law providing for the issue of the scrip certificates.

The bill of complaint is dismissed at complainant's costs.

(Signed) A. J. RICKS, *Judge.*

Endorsements on opinion of the court: 5734. United States circuit court, N. D. O., E. D. Edward B. Wesley *vs.* Howard P. Eels. Filed Nov. 14, 1898. Irvin Belford, clerk U. S. circuit court, N. D. O.

74 *Bill of Complaint Dismissed at Complainant's Costs.*

October Term, A. D. 1898, to wit, November 14th, 1898.

Present: Honorable Augustus J. Ricks, United States district judge.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS. } #5734. Chancery.

This cause having been heard on the pleadings and arguments of counsel, *and* the court, being fully advised in the premises, is of the opinion and does hereby order that said bill of complaint be, and hereby is, dismissed at the costs of the complainant, for which execution is awarded.

75 *Petition for Appeal and Allowance Thereof.*

In the Circuit Court of the United States for the Northern District of Ohio, in the Eastern Division.

EDWARD WESLEY, Plaintiff, Appellant,
against
HOWARD P. EELLS, Defendant, Respondent.

The above-named plaintiff, Edward B. Wesley, considering himself aggrieved by the final decree entered and filed on November 14th, 1898, in the above-entitled cause on a question of the construction and application of the Constitution of the United States, doth hereby appeal from the said decree to the Supreme Court of the United States, and prays that this his appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

J. M. SHALLENBERGER,
WM. H. LYLES,
Attorneys for the Plaintiff and Appellant,
Edward B. Wesley, Columbia, S. C.

And now, to wit, on December 10th, 1898, it is ordered that the appeal be allowed as prayed for.

A. J. RICKS, *Judge, &c.*

76 Endorsement on petition for appeal, &c.: 5734. In the circuit court of the United States for the northern district of Ohio and in the eastern division. Edward B. Wesley, plaintiff, appellant, *vs.* Howard P. Eells, defendant, respondent. Petition and order for appeal. J. M. Shallenberger, Wm. H. Lyles, att'ys for plaintiff. Filed Dec. 10, 1898. Irvin Belford, clerk.

77 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Ohio, in the Eastern Division.

EDWARD B. WESLEY, Plaintiff,
against
HOWARD P. EELLS, Defendant.

On the 10th day of December, eighteen hundred and ninety-eight, came the said plaintiff, by his solicitors, J. M. Shallenberger and William H. Lyles, and says that the decree in the said cause is erroneous and against the just rights of the said plaintiff for the following reasons, to wit:

1. Because his honor held that the South Carolina bond scrip issued under and in pursuance of the act of March 2nd, 1872, are bills of credit within the prohibition of the Constitution of the United States, and therefore void, when he should have held that said bond scrip did not constitute bills of credit within the prohibition of the Constitution of the United States.

2. Because his honor held that the tender of the scrip by Alexander to the State treasurer of South Carolina was not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State—the said Agricultural Hall property is still encumbered by the mortgage, and complainant cannot give defendant a clear title to it—when he should have held that the tender of the scrip by Alexander to the State treasurer of South Carolina was a valid tender and extinguished the lien of the mortgage referred to.

3. Because his honor held that "complainant is not entitled
78 to relief asked in the bill of complaint."

Wherefore the said plaintiff prays that said decree be reversed and said court may be directed to enter a decree in accordance with the bill.

J. M. SHALLENBERGER,
WM. H. LYLES,
Solicitors for the Plaintiff.

79 Endorsement on assignment of errors: 5734. In the circuit court of the United States for the northern district of Ohio, in the eastern division. Edward B. Wesley, plaintiff, against Howard P. Eells, defendant. Assignment of errors. J. M. Shallenberger, Wm. H. Lyles, att'ys for pl'ff. Service accepted 12, 7, '98. Howard P. Eells, by A. St. J. Newberry, his solicitor. Filed Dec. 10, 1898. Irvin Belford, clerk.

80 *Undertaking on Appeal.*

In the Circuit Court of the United States for the Northern District of Ohio, in the Eastern Division.

EDWARD B. WESLEY, Plaintiff, Appellant,
vs.
HOWARD P. EELLS, Defendant, Respondant.

Know all men by these presents we, Edward B. Wesley, of the county of Westchester, in the State of New York, and Joseph Colwell, of the county of Cuyahoga, in the State of Ohio, are held and firmly bound unto the above-named Howard P. Eells in the sum of two hundred and fifty dollars ($250.00), to be paid to the said Howard P. Eells; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 6th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Edward B. Wesley has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the judge of the circuit court of the United States *court* for the northern district of Ohio and the eastern division:

Now, therefore, the condition of this obligation is such that if the above-named Edward B. Wesley shall prosecute said appeal to effect and answer all costs if he fail to make said appeal good, then this obligation shall be void; otherwise shall be and remain in full force and virtue.

81 EDWARD B. WESLEY.

Sealed and delivered and taken and acknowledged this 6th day of December, 1898, as to Edward B. Wesley.
JOHN A. SHIELDS,
[SEAL.] *U. S. Commissioner,*
St. of N. Y.

JOSEPH COLWELL.

Sealed and delivered and taken and acknowledged, as to Joseph Colwell, this 9th day of December, 1898.
HARRISON J. UHL,
U. S. Commissioner for
Northern District of Ohio,
Eastern Division.

Approved:
A. J. RICKS, *Judge, &c.*

Endorsements on undertaking on appeal: 5734. In the circuit court of the United States for the northern district of Ohio, in the eastern division. Edward B. Wesley, plaintiff, appellant, *vs.* Howard P. Eells, defendant, respondent. Undertaking on appeal. J. M. Shallenberger, Wm. H. Lyles, att'ys for plaintiff. Filed Dec. 10, 1898. Irvin Belford, clerk.

82 THE UNITED STATES OF AMERICA, *ss:*

Howard P. Eells, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the 7 day of January, eighteen hundred and ninety-eight, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of Ohio and eastern division, wherein Edward B. Wesley is appellant and Howard P. Eells is respondent, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and the one hundred and twenty-third year of the Independence and sovereignty of the United States of America.

AUGUSTUS J. RICKS,
District Judge.

Service of the above citation is hereby acknowledged and the appearance of the appellee hereby entered.
Dec. 9th, 1898.

HOWARD P. EELLS,
By A. ST. J. NEWBERRY,
His Att'y.

83 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS. } Chancery. No. 5734.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the final record, including the petition for allowance of appeal, assignment of errors, and all proceedings in said cause, and there is embraced in said record a true copy of the opinion of the court and agreement to submit and memoranda of documentary evidence filed in such cause, and there is also trans-

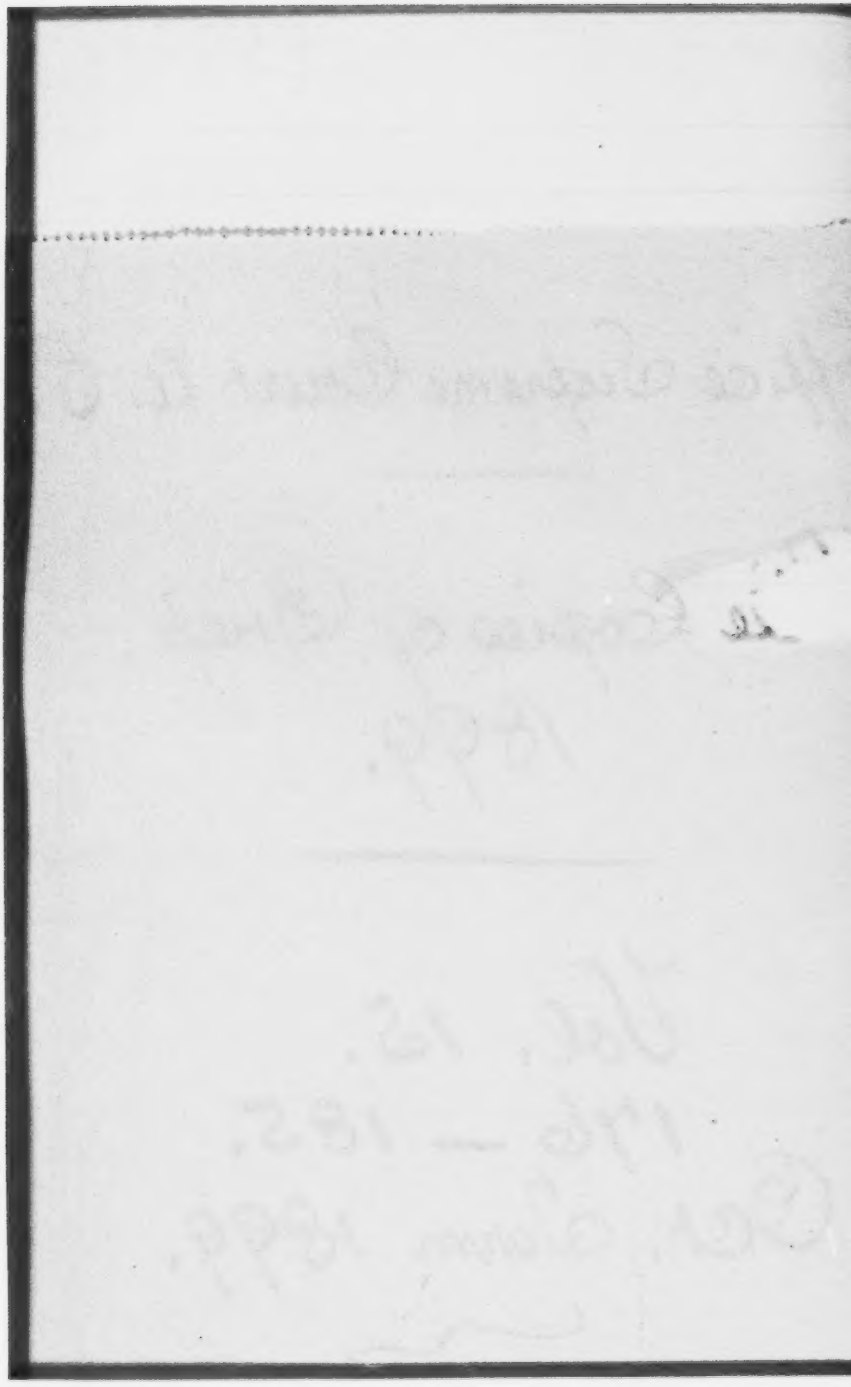
mitted with such record the original citation allowed in this cause and in obedience to which this record is certified to the Supreme Court of the United States.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Cleveland, in said district, on this 17th day of December, A. D. 1898, and of the 123rd year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk*,
By JNO. VAN NOSTRAN, *Deputy*.

Endorsed on cover: Case No. 17,237. N. Ohio C. C. U. S. Term No., 176. Edward B. Wesley, appellant, *vs.* Howard P. Eells. Filed December 27, 1898.



H

Statement on Behalf of Edward B. Wesley, Appellant, in Opposition to Motion of J. D. M. Shaw, for Leave to File Brief and Submit Argument.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

WILLIAM H. LYLES,
Counsel for Edward B. Wesley, Appellant.

17,237.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 176.

Now comes Edward B. Wesley, appellant above named, by William H. Lyles, his counsel, and files the following statement in opposition to the motion of J. D. M. Shaw, as follows, to wit:

STATEMENT.

Appellant emphatically denies that the case above entitled is a collusive effort by the parties thereto to have this court, in an agreed case between them, decide an alleged liability of the State of South Carolina.

He admits, however, that his motive for the purchase of the property referred to in the statement of the motion as the Agricultural Hall, was to force the State of South Carolina to pay to him a small part of a large sum of money due to him by said State, and, if possible, to force the State of South Carolina into litigation to foreclose the mortgage given upon said property by J. W. Alexander and in such litigation to have it determined that said State is liable for the payment of the Revenue Bond Scrip held by appellant.

That the circumstances under which appellant became a creditor of the State of South Carolina were, under a concurrent resolution of the General Assembly of the State of South Carolina, passed at the session of 1899, thoroughly investigated by Hon. Y. J. Pope, then Attorney General of the State of South Carolina, and now adorning the Supreme Court of said State as the Senior Associate Justice thereof, and were clearly embodied in his report to the General Assembly, filed pursuant to the directions of such concurrent resolution. They can best be given by a quotation from that report:

"A HISTORY OF THESE CLAIMS THEMSELVES"

Lest I may do an unintentional injustice to these claimants, I shall consider the claims separately, and this I feel I ought to do because from one standpoint the claim of one occupies a better plane in my best judgment, and as I shall express the ground upon which I base this discrimination between the claimants hereafter, I shall content myself just now by expressing this as the reason for taking the claims up separately.

I will first examine Mr. Wesley's claim. It was very evident, I remarked some time ago, that the public—I mean the investors in public securities—had taken alarm at our money centres in view of the rapid expansion of State securities. Hence soon after 2d March, 1872, when the General Assembly of this State had passed the act providing for the retirement and cancellation of the four million of Blue Ridge Railroad bonds guaranteed by the State and the issue therefor of the one million and eight hundred thousand dollars in Revenue Bond Scrip, we find in company with the State Treasurer and the President of the Blue Ridge Railroad Company in the City of New York, two prominent bank presidents of our own State, two gentlemen who were then and have ever since been esteemed very highly and regarded as gentlemen of character and influence, I mean the late Col. L. D. Childs, President of the Carolina National Bank of Columbia, S. C., and Col. John B. Palmer, President of the Central National Bank of the same

city. No doubt these gentlemen recognized the grave crisis in our State's financial condition and foresaw the wonderful effect retirement of $4,000,000 of public securities, (I say public because when the State guaranteed the payment of the same, pledging for that purpose her faith and credit, these bonds became of that character), would produce among financiers in the City of New York, they sought out Mr. Edward B. Wesley, who, at that time, did not own one dollar of this State securities—indeed, he had refused, representing a prominent banking house in New York some time before that, to consider any proposition for interesting himself in them.

It was represented to Mr. Wesley the great importance to the finances of the State to have these $4,000,000 Blue Ridge bonds retired and with an assurance that there should be placed in his hands $1,005,000 of the Revenue Bond Scrip as collateral security for any money he should advance in the matter of withdrawing from hypothecation these Blue Ridge bonds. As a consequence he advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five, ($344,925) dollars in actual cash, and with this sum he redeemed the sum of two million nine hundred and two thousand ($2,902,000) dollars of those Blue Ridge Railroad bonds with all their coupons attached. Mr. Wesley not only redeemed this large amount of such bonds, but he purchased a chisel and with his own hands so punctured these bonds and the coupons thereto attached that it was forever afterwards rendered impossible for any one to use them on the markets of the world; not only so but he saw them shipped by express to the State Treasurer where, I am glad to say, they are now in the same mutilated condition.

Mr. Wesley received one million and five thousand dollars in Revenue Bond Scrip, but he has always maintained that this Scrip was merely a collateral. I find the same statement in the Supreme Court of the United States brief as I detected in his testimony before me in New York—collateral—today, with but a slight exception, that one million and five thousand

dollars of Revenue Bond Scrip is in the vaults of the Carolina National Bank in this city, where he has retained it, according to the testimony of Col. Wilie Jones, since 1872 or 1873. I had it counted most carefully and the exact amount in the vaults of the bank is $996,840.

Mr. Wesley has not remained passive in his assertion of a claim against this State by reason of his expenditure of $344,-925. Before the revolution in 1876 he had repeatedly sought what he conceives is justice at the hands of the people's representatives in the Legislature of this State. Then efforts were made in the United States Courts culminating in two appeals to the Supreme Court of the United States. These two decisions of that tribunal will be found in *Williams vs. Hagood, 98 U. S. Reports, page 72,* and *Williams and others vs. Hagood, 117 U. S. Reports, page 52.* In the first case the opinion of the court is careful to allow another suit if these parties should so desire. The language of the court in that first cause was certainly encouraging—holding that the decision of our State Supreme Court in the case of *The State ex relatione R. C. Shiver et al., vs. Hoge as Comptroller General,* hereinbefore recited, bound no one as no holder of Scrip was a party to the suit. And in the second suit, to which alone Mr. Wesley was a party, so far as the records disclose, the action is dismissed upon the sole ground that the State of South Carolina is a necessary (party), but could not be forced into court against her will under the eleventh amendment of the Constitution of the United States, whereby States are not liable to be sued except by their own consent.

Nowhere on the merits in either case is there any expression of that court that can be tortured into a depreciation of the claim of Mr. Edward B. Wesley or Amos D. Williams."

But, notwithstanding the fact that this appellant had so advanced to the State of South Carolina so large a sum of money and had thereby relieved it from the burden of so great a debt, and held as security for his said debt the Revenue Bond Scrip above stated, the said State, by its Legislature, afterwards

passed certain acts forbidding the receipt of said Scrip for taxes due to the State of South Carolina and has persistently and constantly refused to pay the said debt or any portion of the said Scrip so held by this appellant as security therefor, notwithstanding the repeated efforts of appellant to obtain payment of the same. And she has also persistently refused to become a party to any proceeding instituted by this appellant or other holder of said Scrip, to test the validity thereof, as evidenced by the records of this court in the case of *Williams vs. Hagood, 98 U. S., 72,* and *Williams and others, vs. Hagood 117 U. S., 52*; and of the case of *The State of South Carolina Plaintiff in Error vs. Edward B. Wesley 155 U. S., 542.*

For these reasons appellant despairing of obtaining justice from said State on account of his said claim, and being advised that the property belonging to the State of South Carolina known as the Agricultural Hall property, was advertised for sale and probably worth the sum of from $15,000 to $20,000, determined to purchase the same, intending to tender his Revenue Bond Scrip in payment for the credit portion of the purchase money thereof, feeling satisfied that the State of South Carolina might accept the same or, in case of her refusal, would be forced to bring action against appellant for the foreclosure of the mortgage executed for such credit portion, and that in any such action against this appellant he could set up the validity of the Scrip tendered in payment therefor.

Appellant hoped that having the justice of his claim, which had been so recently investigated by the Attorney General of said State, and reported to the General Assembly, brought by such proceedings so strikingly to the attention of the public, the General Assembly itself would be induced to take the matter up and reach some adjustment of appellant's rights, but instead thereof, the possession of said premises, so purchased by appellant, was violently taken by the armed officers of the State of South Carolina under the orders of the Governor thereof and this appellant was forced to recover possession of said premises through the channels of the Federal Courts.

So great a lapse of time having occurred without any action taken by the State of South Carolina towards the foreclosure of the mortgage, for which the said Scrip had been tendered, and appellant being a very old man and not inclined to hold real estate so far away from his home, which is in the State of New York, reached the conclusion that he would sell the same, being advised by his counsel that the mortgage so executed upon said property and the tender of payment thereof in Revenue Bond Scrip could still be available for the purpose of determining the validity thereof should any action be brought by the State of South Carolina against the purchaser of said property for the foreclosure of the mortgage; appellant then caused the property to be widely advertised for sale in the Industrial Publication of the Southern Railway Company, widely circulated in all parts of the Union, appellant being honest in his desire to sell the said property but satisfied, upon the advice given, that such sale would not prejudice his chances of determining the question of the validity of said Scrip. That appellant's desire to sell the said property, coming to the attention of the defendant, Howard P. Eells, in some manner which the appellant does not definitely know, application was made to appellant, through his attorney, for the purchase of said property, and after negotiations, the price of $20,000 was agreed upon, and it was currently reported in the City of Columbia, S. C., where said property is situate, that the said Howard P. Eells desired to purchase the same for some manufacturing purpose, but appellant knows nothing as to the correctness of such report. Under the advice of his counsel, appellant did not, during these negotiations, inform the said Howard P. Eells of the existence of any mortgage thereon, intending, after negotiations had ripened into a contract, to propose to the said Howard P. Eells to in some way indemnify him from the existence of said mortgage and to enter into a special contract to undertake the defence of any suit that might be brought by the State of South Carolina to foreclose the same.

That having, upon the examination of the title to said premises, discovered the supposed existence of the said mortgage, the said Howard P. Eells positively declined to take the said property upon any terms that could be suggested by appellant; whereupon this action was commenced by appellant against him in the State of Ohio, which was and still is the State of his residence and citizenship, the courts of that State being the only courts having jurisdiction of the person of the said Howard P. Eells, the action brought by appellant being one to enforce a personal liability.

Appellant admits that he was much pleased at the opportunity thus afforded him of bringing an action which would test the validity of his holding of Revenue Bond Scrip above referred to and was advised by his counsel that he, (appellant), being a resident and citizen of the State of New York, would have the same right to bring the said action against the said Howard P. Eells, a resident and citizen of the State of Ohio, in the Federal Courts, as he would have had to bring such action against any resident or citizen of the State of South Carolina, and appellant admits that he was desirous of so framing the issues in said action as to present squarely to the consideration of the courts the questions as to the soundness of the objections which had been urged to the validity of his Scrip, and for that reason his counsel took special pains in laying before the attorney for the defendant, Howard P. Eells, all of the facts and circumstances attending the issue of the said Scrip and the incurring by the State of South Carolina of its liability to appellant; and appellant's counsel did succeed in convincing the attorney of the said defendant that it was useless to interpose any defence in the said action other than those going to the validity of the Scrip.

That said contract was entered into with the said Howard P. Eells in October, 1897, but appellant, being a very old man, inadvertently did not notice that the exact date of said contract had been omitted and inadvertently executed same without a date written therein; but appellant alleges that negotiations

leading up to said contract had been pending for a month or more prior to the execution of said contract. Appellant further avers that said action was brought in good faith by him to enforce the liability so incurred by defendant, appellant being honestly anxious to dispose of the said property and the said defendant, Howard P. Eells, being a business man of high standing and supposed to be of large means in the City of Cleveland, State of Ohio.

That said cause came on for trial with no further agreement between appellant, as plaintiff, and defendant, or between appellant's attorney and attorney for the defendant, than is frequently found between the litigants and attorneys in causes where there is an honest difference of opinion as to their rights and liabilities without any feeling of personal animosity of the one towards the other, and appellant is advised by his counsel that the argument of Mr. Newberry, attorney for defendant, made on circuit, was elaborate and most forcible. It certainly did convince the Circuit Court in spite of the argument made by counsel for appellant, that the Revenue Bond Scrip in question was invalid under the inhibitions of the Constitution of the United States.

Appellant having been so treated as above stated by the State of South Carolina, felt under no obligation to notify the authorities of said State of the pendency of said action, regarding it as an action for the enforcement of his private right against the defendant to compel him to take the premises in question, although it did incidentally and necessarily involve the question of the validity of the said Scrip.

That while the said cause was pending, and after the same had been submitted on written arguments to the Circuit Judge, the General Assembly of the State of South Carolina did pass the act referred to on page 4 of the Motion Papers, now under consideration, and appellant avers that he is informed and believes that the said provisions did not appear in the bill, afterwards becoming the act referred to, until the said bill was before the Committees on Free Conference of the House and

Senate of the State of South Carolina, when the attorney for the moving party, then the Attorney General of the State of South Carolina, appeared before said committee and caused the adoption of said provisions as an amendment to said bill, which afterwards became a law by its due passage through the General Assembly and ratification by the Governor, but the enactment of such provisions never came to the attention of appellant or his counsel until several weeks after the final adjournment of the General Assembly of said State, when appellant's counsel received notice, through the said Attorney General, of the action of the Commissioners of the Sinking Fund, set forth in said moving papers, the said action being altogether unsolicited on the part of this appellant and considered by him as merely a device adopted by the officers of said State to enable her to avoid the chances of having an honest and fair determination of her liabilities upon the said Scrip.

The original bond and mortgage, which had been executed by the said J. W. Alexander to the Treasurer of the State of South Carolina, were never delivered to appellant or his attorney, or, as appellant is informed and believes, to the said J. W. Alexander, and appellant is not informed whether entry of satisfaction has ever been made upon said original mortgage. He admits that the paper referred to has been recorded in the office of the Clerk of the Court of Common Pleas for Richland County, the office where said deed of mortgage had been improperly and wrongfully recorded, but appellant took no further notice of said proceeding except as hereinafter stated, considering the same to be an effort unworthy of the dignity of a great State to avoid the jurisdiction of the courts to determine fairly the question of liability to one who had honestly and fairly extended credit to her in her hour of great need.

Appellant did cause the counsel for defendant to be informed of the action which had been taken, but not having received the original bond and mortgage and with the experience he had had in the dealings of the officers of the State of South Carolina with him, could not with candor say that it

was not some device which would be afterwards repudiated by legislative authority. Appellant was informed by counsel for defendant that he was no longer willing to take the property having made other arrangements, and appellant was brought to a position where the most that he could have done would have been to file a supplemental bill, the cause being then pending before the Circuit Judge, who was holding the same under advisement, and would, even at best, have been subjected to the payment of heavy costs and expenses, but is advised and believes that he could not then have compelled the defendant to take a title at that late day, freed of encumbrances, but appellant was satisfied and still is satisfied that the said property was free from encumbrance at the time of the contract entered into with the defendant, the said mortgage having been extinguished before it was recorded by the tender of the Scrip referred to in these proceedings.

The decree of the court afterwards coming in, by which appellant's bill was dismissed, appellant was advised that he could not, even if he desired to do so, thus avail himself of the supposed action of the State authorities, and that his only recourse was to appeal from the decree. This having been done and the cause having been entered in this court, although appellant felt under no obligation to the State of South Carolina to advise her of the proceedings, did cause a letter to be addressed to His Excellency, the Governor of the State, of which the following is a copy:

"To His Excellency, William H. Ellerbe, Governor of the State of South Carolina:

Dear Sir: I desire to call your attention to the fact that there is now pending in the United States Supreme Court a case entitled, 'Edward B. Wesley, plaintiff vs. Howard P. Eells, respondent,' which squarely presents the issue as to the validity of the obligations of the State of South Carolina, known as the Revenue Bond Scrip, amounting to $1,800,000. This cause is No. 652 on the docket for the Oct. term, 1898, carried up by appeal from the Circuit Court of the United

States for the Eastern Division of the Northern District of Ohio, having been decided by Judge Ricks of that court during the fall of last year.

You are doubtless aware of the fact that $1,000,000 of that Scrip is held by Mr. Edward B. Wesley, of Port Chester, New York, and that I have been employed by him to establish, if possible, the validity of the Scrip.

Mr. Wesley advanced to the State of South Carolina in cash, $344,000, with which the Blue Ridge Railroad Bonds, amounting to nearly $3,000,000, were taken up and cancelled, and they now lie in the Treasury of the State.

He has always considered himself a creditor of the State in good faith, and has always been reluctant to be forced to take action to establish the validity of the Scrip; and, as it is certain that the decision of the issue can no longer be evaded, it is his desire as well as my own to bring the matter to the attention of the authorities of the State, and afford them an opportunity, if the State is so advised, to be represented on the argument of the cause, so that no question can be made as to its not having been well argued.

The State of South Carolina can become a party to the cause only pursuant to some act or resolution of the Legislature, as it has been held that no officer of the State can enter an appearance for her, without special authority from the Legislature. The cause will probably be reached for argument in the United States Supreme Court before the next session of the Legislature, and I now write to afford you an opportunity to bring the matter to the attention of the Legislature, and to say that, if the State desires to become a party to the litigation, and to have the question argued on her behalf, I have no doubt that I can arrange for her to do so. The defendant, Mr. Eells, was represented in the Circuit Court by Mr. A. St. J. Newberry, a lawyer of great ability, in Cleveland, Ohio, and the cause was very thoroughly argued by him, as appears from the decree, which was in favor of the defendant, and against the validity of the Scrip, upon the ground that it constituted bills

of credit inhibited by the Constitution of the United States. I, however, am very confident that I will be able to reverse the decree of the Circuit Court, and will obtain a decree of the United States Supreme Court for the specific performance of the contract with Mr. Eells, which will establish the validity of the Scrip, and I do not wish to find myself in position of having imposed upon the State an indebtedness of $1,300,000 without affording her an opportunity to defend herself against it or to adjust the claim of Mr. Wesley upon the basis of its own merits, regardless of the question of the validity of the Scrip, if she be inclined so to do.

I remain very respectfully,

(Signed) WM. H. LYLES."

But having had no reply from him, appellant caused a memorial to be addressed to each branch of the General Assembly advising it of the pendency of the action and suggesting if the State desired to be represented in said cause on her own behalf that appellant's counsel would endeavor to arrange for her to be so represented. This memorial was referred to the proper committees of the House and Senate, which reported back to their respective bodies without recommendation and no action whatever was taken thereon.

Appellant is informed and so charges, that J. D. M. Shaw, the moving party, is a countryman of but small means, not particularly interested in public affairs, and appellant charges that the said motion is not really made at his instance and request, but that his name is merely used for the purpose of making a motion at the instance and request of the State of South Carolina herself, who thus again seeks by indirect and unfair means to deprive appellant of the small return which he would receive by success in this case for the large amount lent by him for the benefit of the State.

State of New York, County of New York.

Personally appears Edward B. Wesley, appellant above named, who, being duly sworn, says that the foregoing statement is true to his own knowledge except as to the facts therein stated on information and belief and as to those he believes it to be true.

Sworn to and subscribed before me this —— day of January, 1900.

No. 176.

FILED
JAN 15 1900
JAMES H. McKENNEY
CLERK

Brief of Argument of William Hotchkiss, for Appellant, Against Motion of J. M. Shaw to File Argument.

Filed Jan. 15, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

17,237.

Argument.

I.

The statement of facts in the verified return filed herewith is so full that reference is craved to it.

The motion is made ostensibly for leave to appear and file argument. The moving party has no right to intervene and file an argument.

In the case of *Whitney vs. Hanover National Bank*, Supreme Court of Miss. April 9, 1894, 1 Am. & Eng. Dec. in Eq., p. 663, the court says: "No such practice is known in Equity as making a person a defendant to a suit upon his own application over the objection of the complainant. 1 Danl. Ch. Pl. Pr. 287. Note 2 and cases cited. *Stretch vs. Stretch*, 2 Tenn. Ch. 140., where the subject is fully treated and the action of the court in the case before us is fully vindicated on principle and authority."

In the case of the *State of South Carolina vs Edward B. Wesley*, 155 U. S., 542, the court says: "The State does not complain that it was refused leave to intervene, but that the Circuit Court without the intervention of the State refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The State was not a party to the record in the Circuit Court and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States vs. Lee*, 106 U. S., 196, 197. (27:171, 173); *Georgia vs. Jesup*, 106 U. S., 458 (27:216)."

II.

The court will not, upon the suggestion of the said J. D. M. Shaw, or upon its own motion upon the showing made, dismiss the proceeding, or even order an issue to try the fact.

In the first place we submit that the moving party comes

into court in such a manner as not to entitle him to the consideration of the court, and in the second place, we submit that it is well settled that the court cannot dismiss a suit under the Statute of 1875, upon its personal conviction, however strong, unless the facts on which its conviction is based appear upon the record and create a legal certainty of the conclusion derived from them. *Barry vs. Edmunds*, 116 U. S. 55. *Detutron vs. Young*, 134 U. S., 241.

No matter what may have been the motive of Mr. Wesley for making the contract of sale, if the contract was a *bona fide* one, intended to be enforced, the desire to make use of it to test the validity of the Scrip will not defeat it. In *Morris vs. Gilmer*, 129 U. S., 315, it was ruled: "A citizen of the United States can instantly transfer his citizenship from one State to another, and his right to sue in the courts of the United States is none the less because his change of domicil was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a federal court."

In the case of *Tindal vs. Wesley*, 167 U. S., 209, it was expressly ruled that Mr. Wesley's intention to force an issue as to the validity of this Scrip did not vitiate his rights in the courts of the United States.

In *Lanier vs. Nash*, 121 U. S., page 410, Chief Justice Waite, delivering the opinion of the court, said:

"In this court it was claimed in argument that the transfer was collusive for the purpose of creating a case cognizable by the Circuit Court of the United States, and, therefore, should have been dismissed below under the authority of Section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L., 470; but we find no sufficient evidence to justify us in reversing the decree and sending the suit back for dismissal. The transfer was undoubtedly made for the purpose of putting it in the power of Winslow, Lanier & Co., to bring a suit; but this, for anything that now appears, might as well have been begun in a State as in a Federal Court. The object of the bank seems

to have been, not to give jurisdiction to the Courts of the United States, but to create an ownership which would cut off the anticipated defenses of the mortgagors. That of itself is not enough to make it proper for the courts of the United States to refuse to take jurisdiction if the title made by the transfer is complete, and such as will enable the assignee to maintain a suit in his own name at all. To justify a dismissal it must appear that the object was to create a case cognizable under the Act of 1875."

In the case of *Carter vs. Greenhow*, 114 U. S., 317, reported in the L. C. P. Edition, with head notes by Justice Matthews, the ruling was "that the only mode of redress in case of any disturbance or dispossession of property, or for other legal rights based upon such violation of contract, is to have a judicial determination, in a suit between individuals, of the invalidity of the law, under color of which the wrong has been committed. No direct action for the denial of the right secured by the contract will lie."

In the case of the State of *South Carolina vs. Edward B. Wesley*, supra, the Court says: "In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion."

No. 176.

FILED
JAN 25 1900
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

Brf. of Lyles for Appellant.

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT OF WM. H. LYLES,

Solicitor for Appellant.

17,237.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT OF WM. H. LYLES,
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1.

ABSTRACT OF CASE.

This appeal is taken from a decree of the Circuit Court of the United States for the Northern District of Ohio dismissing appellant's bill of complaint in court below against this defendant.

Complainant seeks the specific performance of a contract for the purchase of certain real estate situate in the City of Columbia, State of South Carolina, known as the Agricultural Hall property, more particularly described in the bill of complaint.

The decree of the court below correctly states the facts of the case, (Printed Record, pages 28-29), as follows, to wit:

"On December 24, 1890, the State of South Carolina being the owner of said Agricultural Hall property, the General Assembly of that State passed an Act providing for the sale of said property by the commissioners of the sinking fund of the State of South Carolina. Pursuant to that Act the property was sold at public auction on February 2, 1892, and was bid in by the complainant, by his attorney, for the sum of $16,165.00.

"By the terms of sale the purchaser was required to pay in cash one-third of the purchase price, and to execute his bond and mortgage of the premises to secure the balance of the purchase price, in two equal annual installments, with interest from the date of sale, the obligor to have the option of paying the whole or any part of the indebtedness so to be secured at any time before its maturity.

"Complainant caused the deed for the premises to be made to one J. W. Alexander, who consented to act as trustee for him for the purchase of the premises, and the deed was duly executed and delivered by the commissioners of the sinking fund to Alexander in fee-simple without a declaration of the trust. Alexander executed and delivered to the treasurer of

the State of South Carolina his bond in the penal sum of $21,553.34, conditioned for the payment of $10,776.67 in two equal annual installments from the date of the bond, with interest payable annually. It was provided in the bond that Alexander should have the privilege of paying the whole or any part of the amount secured by the bond before maturity. The bond and mortgage and deed of conveyance were dated the 2d of February, 1892, the day of sale.

"On the 16th day of February, 1892, complainant Wesley, being the owner and holder of a large amount of revenue bond scrip of the State of South Carolina, furnished to the said Alexander an amount thereof, which, at its par value, was more than sufficient to cover the amount due the State of South Carolina on said bond and mortgage, and Alexander, through his attorneys, exercising the power given him by the terms and conditions of his bond to the State, duly tendered to W. T. C. Bates, State treasurer of South Carolina, the full amount due thereon, including interest. Bates had the custody and possession of the bond and mortgage and was the officer designated by law to receive the amount of the bond and mortgage, he being the obligee named in the bond. The tender was refused.

"By the laws of South Carolina a tender in full of the amount of money due to a mortgagee secured by a mortgage of personal or real property at any time when the mortgagor has a right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage securing the payment of such money, whether the amount so tendered be accepted or not and whether the mortgagor shall keep himself in position to make good the tender or not.

Salinas vs. Ellis, 26 S. C., 337.

"After tender was made by Alexander the State treasurer caused the mortgage given by Alexander to be filed for record in the office of the Register of Mesne Conveyances for Richland County, South Carolina. The mortgage still stands of record unsatisfied.

"On February 15, 1893, Alexander conveyed said Agricultural Hall property to complainant at his request.

"In October, 1897, complainant entered into a contract with Howard P. Eells, defendant herein, whereby he agreed to convey said Agricultural Hall property to said Eells, free from any valid lien or encumbrance whatever, at and for the price of twenty thousand dollars in cash. The premises are now and were at the time of making the contract of the value of twenty thousand dollars. Complainant is ready and willing to deliver to defendant a good and sufficient deed in law to convey the said premises to him in fee-simple. Defendant refuses to receive said deed and pay the purchase price, contending that the revenue bond scrip tendered by Alexander in payment of the amount due on the bond and mortgage was not a valid obligation of the State of South Carolina, and consequently did not constitute a legal tender for the debt and did not operate as an extinguishment of the lien of the mortgage. There are no other liens upon said property except some unentered taxes due the State of South Carolina, which amount complainant is willing that defendant retain out of the purchase price of the premises when ascertained.

"It is admitted that if the revenue bond scrip tendered by Alexander was valid and receivable for dues to the State of South Carolina, the lien of the mortgage was extinguished by its tender; but defendant claims that the revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the State of South Carolina, and that its tender was a mere nullity."

The decree then proceeds to review the facts connected with the issuing of the revenue bond scrip referred to and then concludes as follows, to wit: (Printed Record, page 41).

"The opinion of this court is that the South Carolina bond scrip issued under and in pursuance of the Act of March 2, 1872, are bills of credit, within the prohibition of the Constitution of the United States, and, therefore, void.

"The tender of the scrip by Alexander to the State treasurer

of South Carolina was not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State. The said Agricultural Hall property is still encumbered by the mortgage and complainant cannot give defendant a clear title to it. Complainant is not entitled to relief asked in the bill of complaint.

"The conclusion we have arrived at makes it unnecessary to determine the question of the violation of the Constitution of South Carolina in the enactment of the law providing for the issue of the scrip certificates.

"The bill of complaint is dismissed at complainant's costs."

2.

The appellant duly sued out an appeal to this court upon the following assignment of errors, to wit: (Printed Record, page 43):

1. "Because His Honor held that the South Carolina bond scrip issued under and in pursuance of the Act of March 2, 1872, are bills of credit within the prohibition of the Constitution of the United States, and, therefore, void, when he should have held that said bond scrip did not constitute bills of credit within the prohibition of the Constitution of the United States.

2. "Because His Honor held that the tender of the scrip by Alexander to the State treasurer of South Carolina was not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State—and that the said Agricultural Hall property is still encumbered by the mortgage, and complainant cannot give defendant a clear title to it—when he should have held that the tender of the scrip by Alexander to the State treasurer of South Carolina was a valid tender and extinguished the lien of the mortgage referred to.

3. "Because His Honor held that 'complainant is not entitled to relief asked in the bill of complaint.'"

The questions for consideration by this court then are as to the validity of the revenue bond scrip of the State of South

Carolina, above referred to, as affected by the inhibition of the Constitution of the United States against the issuing by the several States of bills of credit.

(a.)

3.

ARGUMENT.

It is respectfully submitted that the only questions to be considered by this court are the questions arising upon the assignment of errors on the part of appellant which go to the correctness of the ruling of the court below that the scrip constitutes bills of credit emitted by the State of South Carolina in violation of Section 1, Article 10, of the Constitution of the United States, but counsel for appellee urged in the court below and repeats in his argument in this court the objection that the act authorizing the issue of the scrip was in contravention of Sections 7, 10 and 14 of Article 9 of the Constitution of South Carolina, as well as in contravention of the Federal Constitution, and this position will now be considered.

"Section 7. For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each house respectively; and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

"Section 10. No scrip, certificate, or other evidence of a State indebtedness shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution."

"Section 14. Any debt contracted by the State shall be by loan on State bonds of amounts not less than fifty dollars each,

on interest, payable within twenty years after the final passage of the law authorizing such debt. "A correct registry of all bonds shall be kept by the Treasurer in numerical order, so as always to exhibit the number and amount paid, and to whom severally made payable."

I.

In considering the objections under the Constitution of South Carolina it must be borne in mind that the Constitution under which it arises was the one ratified April 10, 1868, and that prior thereto there was no limitation to the power of the Legislature to incur obligations or impose taxes, and up to that date the State had freely undertaken to aid railroad enterprises. Besides, the Charleston and Savannah Railroad Company, lying in the coast region of the State, whose bonds she had guaranteed, she had largely aided the construction of a system of roads extending from Columbia, the Capital of the State, to the foot of the mountains on its Northwestern border. This system consisted of the Greenville and Columbia Railroad, of about one hundred and fifty miles in length, reaching to Greenville and Anderson; and the Spartanburg and Union Railroad, of ninety-three miles in length, which, connecting with the Greenville and Columbia at a point twenty-five miles from Columbia, extended to Spartanburg.

The State had guaranteed the payment of a large amount of the bonds issued by each of these roads.

See *The State* vs. *The Spartanburg and Union R. R. Co.*, 8 S. C., 129 and *Gibbes* vs. *The Greenville and Columbia R. R Co.*, 13 S. C., 228.

The Legislature of the State and its people deemed it of vital importance to the welfare of the State that that system of roads should be extended across the mountains into Tennessee, and the Blue Ridge Railroad was designed for that purpose, to begin at Anderson and to extend to Knoxville, Tennessee.

In 1852, (12 Stat. 182), an Act was passed to incorporate a company to build it. The Act contained a preamble as follows, to wit:

"Whereas the State of Georgia has granted to the Blue Ridge Railroad Company a charter for the construction of a railroad from a point on the boundary line between North Carolina and Georgia, called the Locust Stake, by the most practicable route to Clayton, in Rabun County, to connect with the South Carolina Railroads at Anderson Court House; and whereas it is highly expedient, as well for the interest of a large portion of the people of North Carolina, Tennessee and Georgia, as of South Carolina, that such a railroad communication should be established, but such communication cannot be effected without the co-operation of this State, in opening a way for the same along that part of the proposed route which is in South Carolina," and then pledged the State to the guarantee of the bonds of the company to the extent of one million two hundred and fifty thousand dollars.

By an Act entitled "An Act to Authorize Aid to the Blue Ridge Railroad in South Carolina," approved 21st December, 1854, the Comptroller General was authorized, upon certain conditions, to subscribe the sum of one million dollars on behalf of the State to the capital stock of the Blue Ridge Railroad Company, and it was provided, (12 Stat. 327, Sec 3), "That the State shall have the same rights in the company and in its management as is reserved to private shareholders; and the General Assembly shall at all times have authority to examine into its condition; and the said company shall annually submit to the General Assembly a report exhibiting the condition of its affairs and its prospects." This Act repealed the provisions of the Act of 1852 as to the guarantee of the bonds of the Blue Ridge Railroad, and authorized the guaranty of one million dollars of the bonds of the company instead.

By an Act approved December 22, 1859, (12 Stat. 651), the boards of commissioners of roads of the upper Districts of the State were authorized to subscribe to the stock of the Blue

Ridge Railroad Company. And by an Act approved the 22d day of December, 1859,.(12 Stat. 654), entitled "An Act to Grant Additional Aid to the Blue Ridge Railroad," it was enacted:

"I. BE IT ENACTED by the Senate and House of Representatives now met and sitting in General Assembly, and by the authority of the same, That the Comptroller General is hereby authorized and directed to subscribe three hundred and ten thousand dollars to the stock of the Blue Ridge Railroad Company in South Carolina, for the purpose of completing the said road to Walhalla: PROVIDED, That the aid granted by this Act shall not be construed to exhonerate the stockholders from paying up their subscriptions to the capital stock of the said company, but the company shall call in and apply the same according to the provisions of their charter.

"II. That the said sum shall be paid to the company in bonds of the State, payable in five years, at six per cent. interest per annum, to be signed by the Comptroller General, and issued to the said company upon the making of the said subscription.

"III. The faith and funds of the State, and more especially the amount now due to this State by the General Government of the United States for various claims on the said United States for Revolutionary services, and matters growing out of the Florida war, and other matters through the agent of the State, lately accredited to the said government, are hereby pledged for the redemption of the principal and interest of the said bonds.

"IV. All the moneys arising from the subscription under this Act shall be applied by the said company towards completing the road to Walhalla, and equipping the same for use."

Under these Acts the State of South Carolina became the largest stockholder in the Blue Ridge Railroad company, and in 1868 found the company, like all other Southern enterprises, in greatly straightened circumstances. The Governor of the

State in that year, by his annual message, called the attention of the Legislature to the condition of the company, and it promptly passed the Act entitled "*An Act to Authorize Additional Aid to the Blue Ridge Railroad Company in South Carolina*," found in 14 Stat., at page 25. This is the Act under which the four millions of dollars of bonds guaranteed by the State were issued, and I beg to refer to the Act itself as found in the printed volume of the statutes. These bonds were issued with the guaranty of the State endorsed, and were largely pledged to parties in New York and elsewhere for money advanced to the Blue Ridge Railroad Company. The law of South Carolina is that bonds issued under the terms of such an Act as the one in question, may be issued by pledge as well as by sale. It was so ruled in the Bond Debt cases, 12 S. C., page 201.

"Whether a State debt shall be contracted by sale of its bonds, or by their deposit as collateral security for its loan, are not prescribed in the Constitution and are, therefore, left to the discretion of the Legislature." The language of the court itself is found at page 292.

It will be observed that the Act of 1868 prescribed only that the said bonds, or any part thereof shall not be *used* unless upon the express condition that upon application to the Congress of the United States or to private capitalists the amount of three millions of dollars in currency, or so much of that sum *as may be necessary* shall be furnished in exchange or *upon the security of said bonds.*

The Act clearly contemplated the immediate delivery of the bonds upon endorsement to the company, and it was enjoined not to use them except upon the condition stated. The "*necessity*" for which they were to be sold or pledged was to be judged of by the company and no conditions whatever were imposed upon the use of the first one million dollars.

In the Bond Debt cases, 12 S. C., 200, the following principles were settled:

"5. States issuing negotiable securities incur the same re-

sponsibilities which attach to individuals and corporations in like cases.

"6. The holder of State bonds and coupons is presumed, in the absence of proof to the contrary, to have taken them under-due for a valuable consideration, and without notice of any objection to which they were liable.

"7. Bonds issued by a State through its duly authorized officers under the authority of its laws, professing upon their face that the conditions imposed by the statute authorizing their issue have been complied with, and are valid obligations of the State in the hands of *bona fide* purchasers, although such conditions were not complied with, or, although in their issue gross frauds were perpetrated by the agents of the State."

Cases Considered.

The language of the court upon these points is found at pp. 272-277. Amongst other things, it is there said:

"We think, therefore, that the result of the cases in the Supreme Court of the United States clearly is, that when an Act of the Legislature authorizes the issue of bonds by a municipal corporation upon certain conditions therein named, and the bonds are issued by the proper officers of such corporation, containing a recital that they are issued under the authority conferred by such Act, that such recital is conclusive in favor of a *bona fide* holder—that all the necessary conditions named in the Act have been complied with, as a purchaser is not bound to look beyond the legislative Act and the recitals contained in the bonds. As was said in Marcy vs. Oswegom, 92 U. S., 641: 'the subsequent issue of the bonds containing the recital above quoted—that they were issued 'by virtue of, and in accordance with the legislative Act, and in 'pursuance of, and in accordance with, the vote of three-fifths of the legal voters of the township'—was another determination, not only of the result of the popular vote, *but that all the facts existed which the statute required in order to justify the issue of the bonds.*"

There is, however, a very strong case in which these principles were applied to bonds issued by a State. *California vs. Wells, Fargo & Co.*, 15 Cal., 236. In that case certain warrants which had been issued by the proper authorities of the State were paid and deposited in the office of the State treasurer. The warrants were afterwards stolen and presented to the treasurer to be funded under the provisions of an Act entitled 'An Act to provide for paying certain equitable claims against the State.' Bonds were issued in exchange for the stolen warrants, the treasurer not knowing at the time that they had been stolen. Subsequently, discovering this fact, he demanded the surrender of the bonds, and, upon refusal, brought this suit. There was no allegation or proof that the defendants knew the facts showing the fraud. It was held that, the warrants being negotiable paper, the bonds issued in exchange for them were valid debts in the hands of innocent holders, as the defendants were declared to be, in the absence of any proof to the contrary."

Was the Act of 1868 Constitutional? We submit that it was.

(a). Because a general delegation of the entire legislative power of the people was made by Article 2 Section 1, of the Constitution to the General Assembly, and where there is no express modification of the power it extends to all subjects which had been within its range before the Constitution. Now we have seen that not only had the credit of the State been occasionally lent to railroad corporations, but as to this system of road it was the settled policy of the State to do so, and it was recognized as creating a contingent liability but not a "*public debt*" of the character contemplated by Secs. 7 and 14 of Article 9, for these sections contemplated debts of the character upon which interest had to be paid.

The term debts is not used as the equivalent of the term liabilities, and the only object of those sections was to prescribe the manner in which the liabilities of the State, adjusted and fixed beyond question, should be evidenced as debts.

(b). The Legislature in 1869, under the Constitution in question, directed the guaranty of the bonds of the Charleston and

Savannah Railroad Company, by an Act passed just as was the Act of 1868, and that Act was recognized as of binding force by the Supreme Court of South Carolina in the case of Hand vs. C & S R. R. Co., 12 S. C., 314.

(c). Article 16 of the Constitution, adopted as an amendment in 1873, provides:

"PUBLIC DEBT—VOTE OF PEOPLE—To the end that the public debt of South Carolina may not hereafter be increased, without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the *loan of the credit of the State, by guaranty, endorsement, or otherwise*, except for the ordinary and current business of the State, without first submitting the question as to the creation of any such new debt, guaranty, endorsement, or loan of its credit, to the people of this State, at a general election; and, unless two-thirds of the qualified voters of this State, voting on the question, shall be in favor of a further debt, guaranty, endorsement or loan of its credit, none such shall be created or made."

The amendment adopted by the people, the authors of the Constitution of 1868 itself, fully recognized that prior to the adoption of the amendment obligations of the State might have been contracted by the Legislature by the loan of the credit of the State, or by guaranty, by endorsement, or otherwise, certainly the construction placed upon the Constitution by its authors is binding upon the courts.

Even, however, if the Act of 1868 did violate any of the provisions of the Constitution in the respects referred to, that of 1872 was free from those objections.

(a). It was passed as an Act creating a public debt of the State. See Senate Journal, Sessions of 1871-72, pp. 526-572. See House Journal, Sessions 1871-72, pp. 544-546.

State vs. Cardoza, Treas., 5 S. C. 297.

Bond Debt Cases, 12 S. C. 200.

(b). By Sec. 4 of Art. 14 of the Constitution, it was provided:

"The General Assembly may direct by law in what manner claims against the State may be established and adjusted." That is to say, the Legislature itself might recognize the validity of a claim and establish it as such of its own will, and was the Supreme Judge as to whether the conditions attached to the use of the bonds guaranteed under the Act of 1868 had been complied with. Certain it was that as to at least $1,000,000 of these bonds no conditions had been imposed, and they had gotten into the hands of innocent holders. Whether the State of South Carolina was legally bound by their provisions was not the question. The question was whether its liability was of such a character as to be recognized by the legislative authority as a claim against the State.

The Bond Debt Cases, 12 S. C., 284, ruled: "Bonds of the State issued in payment of outstanding bills receivable, for which the State had received value, are valid and binding obligations, even though such bills should be considered bills of credit, the Constitution of the United States does not prohibit a State from paying bills of credit, and the court said:

"If, however, these bills are of the character claimed for them, it may be that they would be invalid and worthless as legal obligations in the hands of those who happened to hold them, and that if the question were whether the payment of such bills could be enforced, or whether the officers of the State should be restrained from issuing them, the position taken by the Attorney General would be entitled to great consideration. Such, however, is not the question. It is not, and cannot be denied that these bills were issued by the proper officers of the State, under an Act of the General Assembly purporting to confer authority for so doing, and that the State received full value for them. When the State government was reorganized in 1868, they found these bills outstanding, and, even though it should be admitted that they were unconstitutional in form, they nevertheless represented valid and *bona fide* indebtedness of the State. If the State saw fit, voluntarily to recognize such indebtedness, even though it stood in a form

which its legal obligation, and provided for paying it or funding it in a form to which there could be no constitutional objection, we cannot conceive how such an Act on the part of the State, in conformity as it was, to the plainest dictates of common honesty, can be regarded as in violation of the Constitution of the United States. So far from emitting or issuing paper supposed to be within the prohibition of that Constitution, the State, on the contrary, made provision for the withdrawal of such paper from circulation, and replacing it with other evidences of indebtedness in a form which would not be amendable to such constitutional objection."

(c). That the contingent liability of the State represented by its guaranty on the bonds of the Blue Ridge Railroad Company was such a liability, was such evidences of indebtedness previously issued for which scrip, or certificates of State indebtedness might be issued, as was contemplated by Sec. 10 of Art. 9, is established beyond question by the Bond Debt Cases, supra:

"20. Bills of the Bank of the State of South Carolina—a corporation created by the State, and of which it was the only stockholder—issued, under the express authority of the State for its sole benefit, and to the payment of which the faith of the State was pledged, are 'evidences of indebtedness' within the meaning of the provisions of Sec. 10, Art. IX, of the Constitution, that 'no scrip * * * * shall be issued except for the redemption of stocks, bonds, or other evidences of indebtedness previously issued.' And bonds issued in exchange for such bank bills do not create a new debt."

The language of the court is found at p. 287, where it is said:

"It is quite true that these banks bills were not either stock or bonds of the State, but we were at a loss to conceive how any one can deny, in view of the provisions of the bank charter, that such bills were the 'evidence of indebtedness,' which, though not previously issued by a corporation created by the State, in which it was the sole stockholder, under express au-

thority from the State, for the sole benefit of the State. For the charter expressly provided that 'the faith of the State is hereby pledged for the support of the said bank, and to supply any deficiency in the funds especially pledged and to make good all losses arising from such deficiency.' "

The Act of 1872 having been passed by a two-thirds vote, and having complied with all the provisions of the Constitution with reference to Acts creating public debts, was itself a validation of all Acts done under the Act of 1868, and a waiver of any irregularities in the issuance of those bonds.

(4). The question as to the validity of the revenue bond scrip, so far as it is affected by the Constitution of the State of South Carolina, has been twice before the Supreme Court of that State, and although the court has held the scrip invalid as in violation of the Constitution of the United States, it has been silent with reference to the question under the Constitution of South Carolina, and a fair argument may be drawn by inference from such silence, that the court considered the scrip as not in violation of the Constitution of South Carolina.

See the cases of *State ex rel. Shiver* vs. *Comptroller General*, 4 S. C. 185, and the case of *Auditor* vs. *Treasurer*, same vol. p. 311.

It has likewise been twice before the United States Supreme Court, and that court, while deciding the cases against the holders of the scrip, does so merely upon the ground that the cases were actions against the State of South Carolina, and the bills in each case were dismissed for want of jurisdiction without prejudice to the claimant to renew his action. *Williams* vs. *Hagood*, 98 U. S. 72. *Hagood* vs. *Southern*, 117 U. S. 52.

(b.)

This brings us to the important question of the case. Was the revenue bond scrip emitted by the State of South Carolina as bills of credit in violation of the Constitution of the United States?

His Honor, the Circuit Judge, so held and the errors assigned by appellant question the correctness of that ruling.

At the risk somewhat of a repetition I would here again call the attention of the court to the facts of the case:

Prior to 1860 it had been the policy of the State of South Carolina to aid in the construction of the Blue Ridge Railroad. She became by far the largest stockholder in that company. She had by the Act of 1854 directed the Comptroller General, upon certain conditions, to endorse the guaranty of the State upon $1,000,000 of the company's bonds. The result of the war had greatly embarrassed the company, and in 1868 the Legislature waived the conditions precedent to the guaranty of the $1,000,000 of the bonds authorized by the Act of 1854, and also directed the endorsement of the guaranty of the State upon an additional $3,000,000 of the bonds of the company. These $4,000,000 of the bonds of the company, with the guaranty of the State endorsed, had, in 1872, been issued and were practically all outstanding, and were probably in the hands of bona fide holders. One million dollars of them the Legislature had authorized to be issued without condition; $3,000,000 of them had been issued by the officers of the State, who were judges as to whether the conditions had been performed.

In the Bond Debt cases 12, S. C. p. 200, the Supreme Court of South Carolina, has settled the following principles:

"5 States issuing negotiable securities incur the same responsibilities which attach to individuals and corporations in like cases.

"6 The holder of State bonds and coupons is presumed, in the absence of proof to the contrary, to have taken them underdue for a valuable consideration and without notice of any objection to which they were liable.

"7. Bonds issued by a State through its duly authorized officers under the authority of its laws, professing upon their face that the conditions imposed by the statute authorizing their issue have been complied with, and are valid obligations of the State in the hands of bona fide purchasers, although such conditions were not complied with, or although in their issue gross frauds were perpetrated by the agents of the State."

Those bonds being so outstanding and almost certainly binding upon the State, the Act of 1872 was passed authorizing the issue of $1,800,000 of revenue bond scrip to take up and retire the $4,000,000 of railroad bonds; Mr. Wesley was applied to, to advance the sum of money necessary to redeem and retire the $4,000,000 of railroad bonds, and after some hesitation consented to do so and advanced $344,000 towards the accomplishment of that purpose.

At the session of the General Assembly of the State of South Carolina held in 1890, a joint resolution was passed directing the Attorney General, Hon. Y. J. Pope, since elevated to the Supreme Bench of the State, and now the honored Senior Associate Justice of that court, to inquire into the validity of the claims made by Mr. Edward B. Wesley and Mr. Amos D. Williams. Attorney General Pope inquired into the circumstances of the transaction most exhaustively and filed a lengthy report to the General Assembly from which I make the following extracts:

"A HISTORY OF THESE CLAIMS THEMSELVES:

"Lest I may do an unintentional injustice to these claimants, I shall consider the claims separately, and this I feel I ought to do because from one standpoint, the claim of one occupies a better plane in my best judgment, and as I shall express the ground upon which I base this discrimination between the claimants hereafter, I shall content myself just now by expressing this as the reason for taking the claims up separately.

"I will first examine Mr. Wesley's claim: It was very evident I remarked sometime ago that the public—I mean the investors in public securities, had taken alarm at our money centres, in view of the rapid expansion of State securities. Hence soon after 2d, March, 1872, when the General Assembly of this State had passed the Act providing for the retirement and cancellation of the four million of Blue Ridge Railroad bonds guaranteed by the State and the issue therefor of the one million and eight hundred thousand dollars in revenue bond scrip,

we find in company with the State treasurer and the President of the Blue Ridge Railroad Company in the City of New York, two prominent bank presidents of our own State, two gentlemen who were then and have ever since been esteemed very highly and regarded as gentlemen of character and influence, I mean the late Col. L. D. Childs, President of the Carolina National Bank of Columbia, S. C., and Col. John B. Palmer, President of the Central National Bank of the same City. No doubt these gentlemen recognized the grave crisis in our State's financial condition and foresaw the wonderful effect retirement of $4,000,000 of public securities, (I say public because when the State guaranteed the payment of the same, pledging for that purpose her faith and credit, these bonds became of that character), would produce among financiers in the City of New York, they sought out Mr. Edward B. Wesley, who at that time did not own one dollar of this State's securities—indeed he had refused, representing a prominent banking house in New York, sometime before that, to consider any proposition for interesting himself in them.

It was represented to Mr. Wesley the great importance to the finances of the State to have these $4,000,000 Blue Ridge bonds retired and with an assurance that there should be placed in his hands $1,005,000 of the revenue bond scrip as collateral security for any money he should advance in the matter of withdrawing from hypothecation these Blue Ridge bonds. As a consequence he advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five (344,925) dollars in actual cash, and with this sum he redeemed the sum of two million nine hundred and two thousand ($2,902,000) dollars of those Blue Ridge Railroad bonds with all their coupons attached, Mr. Wesley not only redeemed this large amount of such bonds, but he purchased a chisel and with his own hands so punctured these bonds and the coupons thereto attached that it was forever afterwards rendered impossible for any one to use them on the markets of the world; not only so, but he saw them shipped by express to the State treasurer, where I am glad to say they are now in the same mutilated condition.

Mr. Wesley received one million and five thousand dollars in revenue bond scrip, but he has always maintained that this scrip was merely a collateral. I find the same expression in the Supreme Court of the United States brief as I detected in his testimony before me in New York —Collateral—. Today with but a slight exception, that one million and five thousand dollars of revenue bond scrip is in the vaults of the Carolina National Bank in this city, where he has retained it, according to the testimony of Col Wilie Jones, since 1872 or 1873. I had it counted most carefully and the exact amount in the vaults of the bank is $996,840.

Mr. Wesley has not remained passive in his assertion of a claim against this State by reason of his expenditure of $344,-925. Before the revolution, 1876, he had repeatedly sought what he conceives is justice at the hand of the people's representatives in the Legislature of this State. Then efforts were made in the United States Courts culminating in two appeals to the Supreme Court of the United States. These two decisions of that tribunal will be found in Williams vs. Hagood, 98 U. S. Reports, page 72, and Williams and others vs. Hagood. 117 U. S. Reports, page 52. In the first case the opinion of the court is careful to allow another suit if these parties should so desire. The language of the court in that first cause was certainly encouraging—holding that the decision of our State Supreme Court in the case of the State ex relatione R. C. Shiver et al. vs. Hoge, as Comptroller General hereinbefore recited, bound no one as no holder of scrip was a party to the suit. And in the second suit, to which alone Mr. Wesley was a party, so far as the records disclose, the action is dismissed upon the sole ground that the State of South Carolina is a necessary (party) but could not be forced into court against her will under the eleventh amendment of the Constitution of the United States, whereby States are not liable to be sued except by their own consent.

Nowhere on the merits in either case is there any expression of that court that can be tortured into a depreciation of the claim of Mr. Edward B. Wesley or Amos D. Williams."

Thus it will be seen that, judged by the law officer of the State of South Carolina himself, the justice of Mr. Wesley's claim as a bona fide creditor of South Carolina cannot be questioned.

It is well established that the constitutional provision in question was adopted "in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State Governments, of paper money, based alone upon credit," and the question as to whether particular evidences of indebtedness on the part of the several State Governments constituted bills of credit and were emitted in the manner inhibited by the Constitution has in a number of cases been before the Federal and State Courts of the land. I have endeavored to examine all of them. So far as my examination has gone, I give here a complete list of them:

Federal Cases:

Craig vs. Mo., 4 Peters, 410.
Byrns vs. Mo., 8 Peters, 40.
Briscoe vs. Commonwealth Bank, 11 Peters, 257.
Woodruff vs. Trapnall, 10 How., 205.
Darrington vs. Ala. Branch Bank, 13 How., 12.
Poindexter vs. Greenhow, 114 U. S., 270.
White vs. Greenhow, 114 U. S., 307.
Allen vs. B. etc., R. Co., 114 U. S., 311.
Chaffin vs. Taylor 114 U. S., 309.
McCay vs. Washington Co., 3. Wall., jr., (C. C.) 381.

State Cases:

Bailey vs. Milner, 35 Ga., 330.
Pagaud vs. State, 5 Smed. & M., (Miss.) 491.
Bond debt cases, 12 S. C., 200.
State vs. Billis, 2 McCord's Law, 14.
Ind. vs. Worram, 6 Hill, N. Y., 33. (40 Am. Dec., 378).
Central Bank vs. Little, 11 Ga., 346.
Ramsey vs. Cox, 28 Ark., 328.
Parham vs. Izard.

State vs. Cardoza, 5 S. C., 297.
People vs. Brie, 43, Hen., N. Y., 317. (105 N.Y., 618.)
City Nat. Bnk vs. Mahan, 21 La. An., 751.
Bragg vs. Tufts, 49 Ark., 554.

Of these cases the decision in the following were adverse to the validity of the evidences of indebtedness before the courts:

Craig vs. Mo.; Byrns vs. Mo.; City Nt. Bk. vs. Mahan, and Bragg vs. Tufts.

In all of the other cases the evidences of indebtedness were sustained. We need examine only those which were adverse and a few of those sustaining the bills; and the vast preponderance of the cases in which the bills have been sustained shows clearly that the courts of the land are adverse to declaring obligations of States void unless it is clear that the circumstances of their issue bring them within the definition of the term "emit."

In the case of *Poindexter vs Greenhow*, 114 U. S., 270, it is said: "The meaning of the term 'bills of credit,' as used in the Constitution, has been settled by decisions of this court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money, based alone upon credit. The definition thus deduced was not founded on the *abstract meaning of the words*, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, *but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests.* Accordingly Chief Justice Marshall, in *Craig* vs. *Missouri*, 4 Pet., 410, 432, said that 'bills of credit signify a paper medium intended to circulated *between individuals*, and between government and individuals for the ordinary purposes of society.' This definition

was made more exact by merely expressing, however, its implication, in *Briscoe* vs. *Bank of Ky.*, 11 Pet., 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit emitted by the Colonies or States, is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money.' And, again, (p. 318), 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.' The definition was repeated in *Darrington* vs. *Bank of Ala.*, 13 How., 12."

Chief Justice Marshall, in the case of *Craig* vs. *Missouri*, 4 Pet., 431-32, makes it still more clear that the provision was not intended to limit the powers of the States to borrow money or arrange existing indebtedness and to issue therefor evidences of indebtedness in any form which might suit the convenience of parties; for he says: "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day; *thus including a certificate given for money borrowed.* But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, *equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use*; nor are *instruments executed for such purposes, in common language, denominated 'bills of credit.'* To 'emit bills of credit', conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood," and that is the construction of the decision which is recognized by all subsequent decisions on the subject.

In Pagand vs State of Mississippi, 5 Smedes and M., 491, it was held:

"Auditors' warrants issued under the laws of this State making it the duty of 'the auditor of public accounts to settle, examine and audit all accounts, claims or demands whatsoever against the State, arising under any act or resolution of the Legislature, and to grant to every claimant authorized to receive the same, a warrant of the State treasury, are not bills of credit, even though such warrants may sometimes have been used by individual holders as a circulating medium and a substitute for paper money.

FORM OF THE WARRANTS.

48 115.

State of Miss. Auditor's office.

Pay to ———— $115, etc., and for so doing this shall be your warrant. Auditor.

To Treasurer.

"They were not issued to form a circulating medium for the community, nor to operate as a substitute for paper money. That they have been sometimes so used by individual holders cannot alter their legal effect. They are invariably an acknowledgement of indebtedness for services rendered, and to say they are repugnant to the Constitution and void would deprive the State of an important means which it has adopted to prevent impositions and frauds in the treasury.

"It was also urged as error that the court erred in rejecting the testimony which was proposed to be introduced in order to show that at the time the warrant was issued there was no money in the treasury to take it up. The warrants were not then redeemed; that they were under par, but circulated from hand to hand as money, and thus to show that they were bills of credit, etc."

In Central Bank vs. Little, 11 Ga., 351, it was said: "When

we look into the past history of our government we find that many of the States issued bills upon the *general credit* thereof, which circulated as money, without appropriating any *specific fund* for the payment or redemption of such bills. Bills of credit as contemplated by the Constitution, are such as are drawn or issued by the State *upon the general credit thereof without* the appropriation of any specific sum for the payment or ultimate redemption of such bills. In the one case the bills are based upon the *general credit of the State alone.* In the other, the bills are based on the credit of a certain *specific fund,* specially set apart and pledged for the payment of the bills authorized to be put in circulation as money.

The bills authorized to be issued by the charter of the Central Bank were not based upon the *general credit of the State,* but a *specific fund* was created for the payment thereof, consisting of the money in the State treasury, not then otherwise appropriated. This specific fund constituted the capital stock of the bank and was *pledged* for the payment of the bills and notes issued by the bank. The bills and notes, therefore, which were authorized to be issued by the Central Bank under the charter, were not based upon the general credit of the State, but upon the *specific fund* specially appropriated, set apart and *pledged* for the payment thereof. In other words, the bills were not *emitted* upon the general credit of the State as prohibited by the Constitution.

The State of Georgia being sole corporator and owner of capital stock of Central Bank. Gowen against Shute, 4 Baxter, (Tenn.), 57.

A bill of credit, such as a State is inhibited from issuing, is a bill drawn by the State and resting merely on its credit for payment. And a note or bill drawn by the State, the payment of which is to be made out of a fund pledged for that purpose, is not such a bill of credit.

On demand State of Mississippi will pay to bearer sum of ———— out of proceeds of cotton pledged for the redemption of this note, etc.

Ramsay vs. Cox, 28 Ark., 367.

Ramsay tendered Cox, an officer of the court, $15 in treasurer's certificates, which were refused.

The Act of 1868 provides for the issuance of eight percent. treasury certificates in small denominations and declares that "said certificates shall be receivable for all State taxes except taxes for school purposes and all other debts due the State."

"These certificates were not issued to circulate through the community for its ordinary purposes as money, but in every case they were issued as evidences of indebtedness on the part of the State to those to whom they were issued. We see nothing in this to give them the character of bills of credit. Nor we apprehend their circulation among the people on account of their value in the payment of taxes give them that character."

See the text 1 Kent Com. 408, (12 Ed., 1896), and note (a), where it is said: "Craig vs. The State of Missouri, 4 Peters, 410. In the case of Briscoe vs. The Bank of Kentucky, 11 Peters, 257, the question what were *bills of credit*, of which the emission was prohibited to the States, was extensively discussed. They were defined to be *paper issued by the authority of a State on the faith of the State, and designed to circulate as money*; and under this definition it was adjudged that a bank of the State of Kentucky, established in the name and on behalf of the State, under the direction of a president and twelve directors chosen by the Legislature, and the bank exclusively the property of the State, and with a capital of two millions, and with authority to issue notes payable to bearer on demand, and receive deposits and make loans; and the notes of which bank, by a subsequent Act, were to be received on executions by plaintiff, and if refused, further proceedings to be delayed on the judgment for two years, *was not within the prohibition in the Constitution of the United States against the emission of bills of credit*. Mr. Justice Story dissented from this decision, and said that the late Chief Justice Marshall was of opinion with him, when the same case was before the court, and argued at a pre-

ceding term; and he further said that he would not distinguish the case in principle from that of Craig vs. The State of Missouri. It appears to me, with great submission to the Supreme Court, that this decision essentially overrules the case of Craig, and greatly impairs the force and value of the constitutional prohibition. In the case of Linn vs. State Bank of Illinois, 1 Scam., 87, decided by the Supreme Court of that State in 1833, it appeared that the State Bank of Illinois was owned by the State, and authorized to issue notes or bills in small sums from twenty dollars to one dollar, drawing interest, and receivable in payment of debts due to the State; and that the Legislature were pledged to redeem the bills, and creditors were stayed from collecting their debts for three years, unless they would receive the bills in payment. The court held that the analogy was so striking between the institution and the Missouri loan office, as to render the decision in Craig vs. The State of Missouri in point, and binding on the States; and, consequently, it was adjudged that the Act establishing the State Bank of Illinois was unconstitutional and its notes void. And in the case of McFarland vs. The State Bank, 4 Ark., 44, the Supreme Court of Arkansas held itself bound and concluded by the decision in Briscoe vs. The Bank of Kentucky, though it was admitted to be inconsistent with the doctrine and decision in the prior case of Craig vs. The State of Missouri. The court evidently regretted that the case of Craig had been overruled, as it contained the sound and true constitutional doctrine. The Bank of Arkansas stood on the same ground, and had the same essential qualities, and its notes were bills of credit within the decision of Craig, and not bills of credit within the decision of Briscoe, and the latter decision they held themselves bound to obey."

In the case of the *State* vs. *Cardoza, Treas.*, 5 S. C., 309, it is said: "The first objection is that the certificates of indebtedness now demanded are 'bills of credit', within the meaning of the Constitution of the United States,' the subject has been so lately and fully considered by the court in *Shiver vs. Hoge*,

May Term, 1873, that it is not our purpose now to enlarge upon it. As was there said, the fact that the debt or obligation of the State might be readily received in the community in the payment of debts or purchase of commodies might not so impress the paper with the qualities which would render it obnoxious to the Constitution, for it is the *intention to create a currency—a circulating medium*—which invalidates the emission, and this must *be apparent from the whole scope of the Act*. That some of the said certificates of indebtedness were to be receivable in taxes due to the State affords no evidence of an intention on the part of the Legislature to create a currency or circulating medium. It was but a ready and legitimate mode of their payment or redemption, and exhibits no purpose of creating a medium by which the volume of circulation might be so increased as to produce all the evils of a redundant and excessive currency. There is no intention to do more than provide for the creditors, to whom the indebtedness of the State was admitted, the means of making their debts available in the payment of taxes, or even other dues to the State, provided there should be a deficiency in the supplies to meet the various appropriations they were expected to pay. The certificates in no way increased the obligation of the State, and, in fact, only constituted another admission by the General Assembly of the particular debt not paid by the certificate, but remaining due until its satisfaction was unconditionally acknowledged."

The Act itself is printed in full in the Circuit decree, pp. 30-32 of the Printed Record. An analysis of it shows clearly that it was not the purpose of the State of South Carolina to create a currency for circulation between individuals, or between the State and individuals. Its whole purpose was to relieve the State of South Carolina from a large burden of indebtedness and it only gave to the scrip, authorized to be issued, such incidents as would induce the holders of the old securities to take it in lieu of their holdings. The title of the Act declares its object to be "to relieve the State of South Carolina of liability for its guarantee of the bonds of the Blue Ridge

Railroad Company." The preamble shows the dire condition of the finances of the State and the danger *of* serious loss to it by failure to retire the bonds.

Section 1 directs the financial agent of the State in New York to immediately deliver to the State treasury all Blue Ridge Railroad bonds held by him for cancellation.

Sec. 2 directs that upon surrender of the balance of the $4,000,000 of bonds, with the guaranty of the State endorsed, the State treasurer is to deliver to the President of the Blue Ridge Railroad Company "Treasury certificates of indebtedness (styled revenue bond scrip), to the amount of $1,800,000, the said certificates to be executed in the manner hereinafter directed."

Sec. 3 directs the treasurer to have the certificates printed in such form and of such denomination as may be determined on by the State treasurer and the President of the Blue Ridge Railroad Company, and directs that such scrip should be signed by the State treasurer, and should "express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof and that the same will will be received in payment of taxes and all other dues to the State except special taxes levied to pay interest on the public debt."

Sec. 4 pledges the faith and funds of the State to the redemption of the scrip; directs the county treasurers to receive the same in payment of all taxes levied by the State, and directs the State treasurer and other public officers to receive the same in payment of all dues to the State, and levies an annual tax of three (3) mills on the dollar in addition to the other taxes, on the assessed value of all taxable property in the State to be collected in the usual manner, and directs the State treasurer to retire one-fourth of the amount at the end of each year from the date of the scrip until all should be retired, and to apply to such purpose exclusively the tax levied under said section.

Sec. 5 provides that the treasurer might pay out any of the scrip received in payment for taxes.

Sec. 6 directs the cancellation of the Blue Ridge Railroad bonds delivered to the State.

Sec. 7 relieves the lien of the State upon the property of the Blue Ridge Railroad Company.

Sec. 8 authorizes the company to do certain things upon the acceptance of the provisions of the Act.

Sec. 9 prescribes a penalty for counterfeiting the scrip.

None of the qualities given to this scrip are other than such as has been decided in the cases of *Poindexter vs. Greenhow*, *State vs. Cardoza* and *Ramsay vs. Cox supra*, to be mere incidents of the debt. Surely where it is a matter of record, found in this case in the Circuit Decree, Printed Record, page 33, that "the exchange contemplated by this Act was effected; individuals holding the guaranteed bonds as collateral security for loans of money to the railroad company surrendered them and accepted in lieu thereof revenue bond scrip at the lower rate. Complainant Wesley advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five dollars in cash, and with that sum two millions nine hundred and two thousand dollars of the said Blue Ridge Railroad bonds, with all their coupons attached, and delivered the same to the treasurer of the State of South Carolina, and the said bonds and attached coupons were mutilated and cancelled in accordance with the provisions of said Act. Wesley received from the State treasurer of South Carolina one million five thousand dollars of the said revenue bond scrip," it must be held that these certificates were issued, not for the purpose of creating a currency, but for the purpose of retiring a debt. The record shows, too, that as a matter of fact, the scrip has never gone into the hands of the public, but was delivered by the State treasurer directly to appellant and has since then been continuously held by him.

Much has been said about the form of the certificates, that is, that they are printed on small sheets of paper about the size of an ordinary bank bill. Surely there is nothing in the form of the paper upon which this scrip is printed, and even if so that

form was not prescribed by the Legislature. When it directed the treasurer to have it printed in such form as should be agreed upon between him and the President of the Blue Ridge Railroad Company, it certainly cannot be contemplated that it intended to authorize a form which would be obnoxious to law. It may be observed that there is no promise on the face of the paper itself of payment by the State, and this would seem to indicate that the persons who drew it contemplated that it should be what the Legislature intended it to be, merely a certificate of indebtedness receivable in payment of taxes and dues. Justice Matthews, in the case of *Hagood vs. Southern*, referred to this characteristic of the paper, and it is fair to infer that he did not consider the scrip to be bills of credit. He there says: "The peculiarity of the alleged contract deserves to be noted. The instrument, looked at as the sole evidence of the obligation, contains no promise whatever to pay money. It declares simply that it is receivable for the amount of money named, in payment of taxes and dues to the State, except special tax to pay interest on public debt. If it be read as containing the law which authorized its issue, it is a contract that it shall be redeemed, one-fourth of the whole amount each year, out of taxes specially to be levied for that purpose. Although styled in the law 'certificates of indebtedness,' there is no agreement generally to pay a named sum at a given time, in the usual form of public securities for the payment of money, nor even an express acknowledgement of an existing debt."

The Circuit Decree is based mainly upon the opinion of the Supreme Court of South Carolina in the cases of *State ex relatione Shiver vs. Comptroller General*, 4 S. C., 185, and *Dupre vs. County Treasurer*, 4 S. C., 311. These cases certainly are not binding upon any one either as adjudications or as authority. This court, by Justice Matthews, in the case of *Hagood vs. Southern*, 117 U. S., 52, has said: "It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip; and the controversy between them and the State involves the very question of the ex-

istence and obligation of the alleged contract. This controversy the State has undertaken to settle for itself. By its legislative department it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection and appropriation of taxes for the payment of the scrip. Through its judicial department it has declared, as between itself and its officers, that the instruments themselves are unconstitutional and void and without obligation. To this judgment, however, no holder of the scrip was a party, and, of course, it concludes no one." How the opinion of the Supreme Court of South Carolina in those two cases can be reconciled with the later case of the *State vs. Cardoza*, in 5 S. C., *supra* is difficult to explain.

Further, the redemption of the scrip did not depend wholly upon the good faith of the State for as between the State and the railroad company it was competent for the State to enforce its payment against the company. It was so ruled by this court in the case of *Hagood vs. Southern*, *supra*, where it says: "As between the railroad company and the State, the former is primarily liable for any debts represented by the revenue bond scrip, or for which it is held by others as security, and is bound to indemnify the State against loss on account of its suretyship." That was one of the issues ruled in that case and upon the strength of that the case was dismissed, because the railroad company had no right to tender the scrip in payment of its taxes,

There was also, by the Act of 1872, a special tax levied for the purpose of retiring one-fourth of the scrip annually, and in determining the intention of the Legislature from the scope of the Act itself, it is not to be presumed that such provision was made simply for the purpose of trapping the unwary, but it must be considered as showing a scheme on the part of the Legislature to compromise and liquidate a liability of uncertain *amount*, and to provide for its satisfaction in four equal annual installments without interest.

We respectfully submit that where, as it was on the tender *of*

the scrip in satisfaction of the mortgage debt, it was a question between the State of South Carolina and Mr. Wesley, from whom she had borrowed so large a sum of money upon the pledge of the scrip, it was not competent for her officers to set up her own supposed wrongful act against him, an innocent party.

Wherever any paper has been held obnoxious to the provision in question, the point has been raised in defence of some action brought by the government, or its financial agent, issuing the paper, against some one to whom it has been issued —cases clearly where the party was prevented from recovering on account of his own wrong. A successful defence in this case would establish that a sovereign State may, by such questionable acts, obtain large sums of money from an individual and repudiate its own liability by saying that its officers have issued the paper in violation of the Constitution of the United States.

In the case of the *State vs. The Pacific Guano Company*, 22 S. C., 50, It was held that "when the State comes into her own courts to assist a right of property, she is, of course, bound by all the rules established for the administration of justice between individuals.

In conclusion we would respectfully submit that there can be no doubt, indeed it is not a fact questioned, and it has never been questioned by the officers of the State of South Carolina, that the Appellant, Edward B. Wesley, in good faith, advanced to the State a large sum of money, and that if the State avoids the payment of the debt, it will be only by the sheerest technicality which her own courts, in the bond debt case, *supra*, have held she was not bound to resort to.

In *Woodruff vs. Trapnall* 10, How., 205, we find, (Syllabus):

"In 1836 the Legislature of Arkansas chartered a bank, the whole of the capital stock of which belonged to the State, and the president and directors of which are appointed by the General Assembly.

"The twenty-eighth section provided, 'That the bills and

notes of said institution should be received in all payments of debts due to the State of Arkansas. ' "

In January, 1845, this twenty-eighth section was repealed.

The notes of the bank which were in circulation at the time of this repeal, were not affected by it.

The undertaking of the State to receive the notes constituted a contract between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State.

Therefore, a tender, made in 1857, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the State; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing Act was passed."

Office Supreme Court U. S.
FILED
JAN 15 1900
JAMES H. McKENNEY,
Clerk.

No. 176.

Brf. of Newberry for Appellee

Filed Jan. 15, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT ON BEHALF OF HOWARD P. EELLS, APPELLEE, ON MOTION OF J. D. M. SHAW FOR LEAVE TO FILE BRIEF AND SUBMIT ARGUMENT.

A. ST. J. NEWBERRY,
Counsel for Howard P. Eells, Appellee.

(17,237.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-15-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Now comes Howard P. Eells, appellee above named, by A. St. J. Newberry, his counsel, and files the following statement upon the motion of J. D. M. Shaw, to wit:

STATEMENT.

It is not true that this case is a collusive effort by the parties thereto to have this court, in an agreed case between them, decide an alleged liability of the State of South Carolina.

On or about the 24th day of October, A. D. 1897, this appellee entered into a *bona fide* contract with the appellant to buy from him the premises in the bill described. In such contract the appellant covenanted that said property was free and clear from any encumbrance.

Immediately thereafter this appellee investigated the title to said premises and discovered that there was on record a large mortgage in favor of the State of South Carolina unsatisfied and uncancelled. He thereupon communicated with the counsel for appellant, who claimed that the mortgage was satisfied and discharged by a tender of revenue bond scrip, as alleged in the original bill in this action. Thereupon this appellee notified the appellant that he would not purchase the premises on account of the existence of said mortgage.

Shortly thereafter this action was brought and was duly submitted to the circuit court, on an agreed statement of facts, on the 5th day of February, A. D. 1898.

On account of the illness of the district judge for the northern district of Ohio, no decision was rendered in said cause until on or about the 14th day of November, A. D. 1898, at which time judgment was rendered in favor of the appellee.

Some time during the summer of 1898 the appellee was first informed that some action had been taken by the officers of the State of South Carolina toward cancelling the mortgage, and was at the same time advised by his counsel that it was at least doubtful whether such a cancellation by the officers of the State of South Carolina, without any actual consideration, was valid, and would make the title to the premises clear as against the State of South Carolina. He was also advised that a decision of the circuit court in his favor in this cause would terminate all his liability upon the contract, and that a decision of the circuit court in favor of the complainant in this cause would finally and conclusively dispose of the lien of the mortgage. At that time the ap-

pellee did not, nor does he now, desire to purchase the property in question, partly because his business circumstances and conditions have changed, and partly because he has become convinced that the State of South Carolina does not offer a desirable or safe field for investment.

On or about the 9th day of December, A. D. 1899, Mr. William A. Barber, counsel for appellant on this motion, began a correspondence with Mr. A. St. J. Newberry, counsel for this appellee, copies of all which letters are hereto attached, in which the counsel for the appellee, with his approval, agreed that Mr. Barber might prepare such briof as he desired in support of the decision of the circuit court, and submit the same to him, and that after examination consent would be given to the filing of said brief, unless it were manifestly improper.

The appellee is perfectly willing to have Mr. Barber, or any other party honestly interested in the results of this action, file a proper brief in support of the decision of the circuit court, so that this honorable court may render its decision in the light of all such information and authority as can be furnished; but appellee submits that the purpose of the motion and of the party filing the same is manifestly not that this honorable court may be fully advised as to law and facts, and therefore render a proper decision in the case, but to induce this court to render no decision whatever, and to sacrifice the rights of the parties in this cause, because the State of South Carolina fears that by the decision of this honorable court in this cause it may possibly be compelled to meet some obligations which it might otherwise escape.

All of which is respectfully submitted.

HOWARD P. EELLS, *Appellee.*

A. ST. J. NEWBERRY, *His Counsel.*

STATE OF OHIO, *Cuyahoga County,* } ss:

A. St. J. Newberry, being duly sworn, says that he is the duly authorized attorney of said Howard P. Eells, appellee; that said Howard P. Eells is a resident and citizen of the State of Ohio and is now absent from said State, and that all the statements and allegations in the foregoing statement contained are true except such as are stated to be on information and belief, and as to these he believes them to be true.

A. ST. J. NEWBERRY.

Sworn to before me by the said A. St. J. Newberry and by him subscribed in my presence this twelfth day of January, A. D. 1900.

[SEAL.] E. J. MAGUIRE,
Notary Public.

DECEMBER 9, 1899.

A. ST. J. NEWBERRY, Esq.,
Atwater Building, Cleveland, Ohio.

MY DEAR SIR: I note your appearance as counsel of record for the appellee in the case of Edward B. Wesley, appellant, *vs.* Howard P. Eells, No. 176, October term, 1899, in the Supreme Court of the United States. The issue involved in this case, as appears from the transcript of record, is such that its determination by the Supreme Court will manifestly affect the interest of many persons not parties to the suit.

I trust, therefore, that you will see, in the very nature of the case, my warrant for asking your consent that I file such brief and be heard to present such motion and argument in support of the conclusion of the circuit court as the interests of those whom I represent may suggest. This is the courtesy I desire to ask. I beg to assure you that I have no

desire to interfere in any way with the orderly progress of the cause.

Will you kindly favor me with a reply at your earliest convenience, and I shall be greatly obliged.

Yours very truly, WM. A. BARBER.

(Copy.)

CLEVELAND, O., *December* 11, 1899.

WILLIAM A. BARBER, Esq.,
35 *Nassau Street, New York City.*

DEAR SIR: Your favor of the 9th instant, in regard to the case of Edward P. Wesley *vs.* Howard P. Eells, and in which you ask the privilege of filing brief and appearing and presenting motion and argument in support of the conclusions of the circuit court, is received and contents are carefully noted.

Personally I see no objections to permitting you to do this, and when my client returns to this city, which will be within a very few days, I will submit the matter to him, and if he has no objection, will so advise you.

Before agreeing to this, however, we will wish to know who you represent and just what motion and argument you desire to offer. Please advise me at once about this, so that I may lay the whole matter before my client.

Truly yours,

(Signed) A. ST. J. NEWBERRY.

DEC. 13, 1899.

A. ST. J. NEWBERRY, Esq.,
Atwater Building, Cleveland, Ohio.

MY DEAR SIR: Replying to your letter of December 11th, relative to the case of E. B. Wesley *vs.* Howard P. Eells, I beg to say that I represent a citizen tax-payer of South

Carolina, who, on behalf of himself only, desires to file a brief on the question of the validity of the Blue Ridge bond scrip if the court is to pass upon that question in this case.

Yours truly, WM. A. BARBER.

(Copy.)

CLEVELAND, O., *December* 14, 1899.

WM. A. BARBER, Esq.,
35 Nassau Street, New York City.

DEAR SIR: I have your favor of the 13th inst. and note contents. As I look at it, the principal question between the parties in the case of Wesley *vs.* Eells is the validity of the so-called revenue bond scrip. This validity I have so far contested with success, and shall contest it in my argument before the Supreme Court. Personally I shall be glad to have any other parties interested file their briefs and arguments against the validity of this scrip, in support of mine.

I do not see how other counsel can appear in this case, except as my associates and nominally for the defendant, of course, with the understanding that no fee be charged the defendant for their services.

If you care to prepare brief and argument on the point referred to, and submit me copy before the hearing, on the above understanding, I shall be glad to examine it, and will then consent to its filing, unless it then seems to me manifestly improper and injurious to my client to do so, which contingency I can hardly regard as possible. If this is satisfactory to you, I shall be glad to furnish you copy of my own brief so soon as the same is ready for delivery, which will be shortly.

Truly yours,

(Signed) A. ST. J. NEWBERRY.

(Copy.)

CLEVELAND, O., *December* 16, 1899.

WM. A. BARBER, Esq.,
35 *Nassau Street, New York City.*

DEAR SIR: I have consulted with my client in regard to your request that you be allowed to appear before the Supreme Court in the case of Wesley *vs.* Eells. Mr. Eells says that, as I won the case in the court below, he is satisfied to entrust his interests to my hands in the Supreme Court also, and does not see the need of additional counsel.

It is, however, at least possible that other counsel might be able to add something to the strength of our case, either in matter cited or manner of statement, and I should, of course, be glad to have this done. If you care to prepare a brief and argument in support of the decision of the circuit court, and submit it to me, I will carefully examine it and then decide whether to consent to its filing, and will then give such consent unless the brief then seems to me improper and injurious to my client's interests. Mr. Eells has given me authority to use my discretion in the matter up to this extent, but no further.

Truly yours,
(Signed) A. ST. J. NEWBERRY.

(Copy.)

THE RALEIGH, WASHINGTON, D. C.,
January 6, 1900.

A. ST. J. NEWBERRY,
Atwater Building, Cleveland, Ohio.

DEAR SIR: I inclose herewith copy of notice and motion on behalf of J. D. M. Shaw for leave to file brief and submit argument in case of Edward B. Wesley *vs.* Howard P. Eells.

Kindly sign acceptance of service on inclosed postal card and return to me.

Very truly yours,

(Signed) WM. A. BARBER.

Inclosures.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS.

Due service of notice and motion on behalf of J. D. M. Shaw for leave to file brief and submit argument in above-stated case accepted this — day of January, 1900, and copy retained.

(Copy.)

CLEVELAND, O., *Jan.* 8, 1900.

WM A. BARBER, Esq.,
The Raleigh Hotel, Washington, D. C.

DEAR SIR: Your favor of the 6th instant, with copy of motion in Wesley *vs.* Eells case, is received and contents are carefully noted.

The filing of a motion on such grounds and your attack on the good faith of my client and of myself is rather a surprise to me, after our previous correspondence and my agreement to allow you to file a proper brief in the case. At least this is not the sort of practice to which I have been accustomed.

Very truly yours,

(Signed) A. ST. J. NEWBERRY.

No. 176.

Brief of Newberry for Appellee

Filed Jan. 15, 1900.

Office Supreme Court U. S.
FILED
JAN 15 1900
JAMES H. MCKENNEY

BRIEF AND ARGUMENT FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

(17,237)



(17,237)

SUPREME COURT OF THE UNITED STATES

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

ARGUMENT OF A. ST. J. NEWBERRY, SOLICITOR FOR APPELLEE.

I.

This is an action for the specific performance of an admitted contract between the appellant and appellee, for the sale and purchase by them respectively of certain property, known as Agricultural Hall, in the City of Columbia, State of South Carolina, which property is fully described in the Bill. The facts in regard to the making of the contract, are admitted, and a copy of the contract is attached to the stipulation. (Record page 23.)

After entering into the contract the appellee, on examination of the real estate titles, discovered that there appeared to be outstanding and unsatisfied a large mortgage from one J. W. Alexander to the State of South Carolina, said mortgage having been given for the unpaid remainder of the purchase price of the property, when bought by Mr. Alexander from the State. On account of the existence of this encumbrance the appellee has refused to complete his contract and pay the purchase price.

The appellant claims that the mortgage in question has been extinguished, by a tender to the proper officers of the State of South Carolina, of a sufficient amount of what is known as revenue bond scrip, an obligation of the State of South Carolina, and receivable for all dues payable to it, and that under the laws of the State of South Carolina, this tender destroyed the lien of the mortgage, and the same is no longer in force, and the title to the premises is therefore clear.

There is no controversy between the appellant and appellee in this cause, as to the facts relating to the transaction between them, nor as to the acts of the appellant in making a tender of the revenue bond scrip. The facts which led to the possession by the appellant of this revenue bond scrip, have been fully passed upon by the Supreme Court of the United States, in two cases which are cited in the stipulation aforesaid, and in many cases in the State of South Carolina, all of which are also cited in said stipulation. Further controversy about such facts would merely produce delay and expense, and could lead to no result in favor of the appellee. He has therefore admitted these facts, in so far as they appear to have been established of record, and argument will be confined to the legal questions connected with the creation of this revenue bond scrip.

II.

In the light of the South Carolina Statute cited in the stipulation, (Record page 12) and of the decision of the Supreme Court of South Carolina in Salinas vs. Ellis, 26 S. C. 337, it does not seem to us questionable, that the tender made by Mr. Alexander extinguished the lien of this mortgage, provided the revenue bond scrip so tendered was valid and receivable for dues to the State of South Carolina. We claim however, that this revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the State of South Carolina, and that its tender was a mere nullity.

The act of the Legislature of South Carolina, passed 2d March, 1872, which authorized and required the State Treasurer to execute and deliver "Treasury Certificates of Indebtedness of the State of South Carolina (styled Revenue Bond Scrip)" is in violation of Article I, Section 10, of the Constitution of the United States, which declares that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts, and is null and void.

In the cases of The State of South Carolina ex relatione, E. F. Gary vs. Niles G. Parker, State Treasurer, and Dupre vs. County Treasurer, which were proceedings to enjoin the State and County Treasurers from receiving the said scrip for past due taxes, and for taxes thereafter to be collected, before Willard, A. F., of the Supreme Court, in 1873; it was adjudged that the Act of 2d March, 1872, was unconstitutional and void, and that the scrip issued thereunder was illegal; and the Court ordered that the State and County officers be enjoined from receiving the said scrip in payment of taxes and from paying out the same.

In the case of The State ex relatione R. C. Shiver, J. P. Southern et al, vs. S. L. Hoge, Comptroller-General (4 S. C., 185), which was an application to the Supreme Court of the State for a mandamus to compel the Comptroller-General to levy and collect the tax for the redemption of the Revenue Bond Scrip as provided by Section 4 of the Act of 2d March, 1872; the Court refused to grant the mandamus.

The opinion of the Court was delivered 18th April, 1873, by Moses C. J. Of the case, State ex rel. Gary vs. Parker, stated above, it is said: "The judgment which stands in full force, and, until reversed, should be accepted as the law by which the State and County officers connected with the levy and collection of taxes must be governed, holds the emission of the scrip void for its repugnance to the Constitution of the State and of the United States. * * * The respondent, not only insisting on the cause heretofore noticed, submits that the said Act is null and void, in that it is repugnant to the Constitution of the United States, which ordains that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. A careful consideration, induced by the large pecuniary interests involved in the question, together with the fact that provisions both of the State and United States Constitutions have been brought into its discussion, has satisfied us that the Act, so far as it authorizes the emission of Revenue Scrip, is in violation of the clause of the Constitution of the United States, already referred to.

"The argument which holds it valid as a subsisting obligation, and repels the character of a bill of credit, under which it is classed by the respondent, seems to rest upon the fact that it was not designed to circulate as money. The opinion of Mr. Justice Willard, in State ex rel. Gary vs. Parker, Treasurer and Dupre vs. County Treasurer, which was brought to our notice in the case before us, and which will be reported with it, is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community like money that it is to be held a bill of credit, nor does the fact of currency so constitute it. A State might well make the coupons attached to its bonds receivable for taxes, without subjecting them to the disabilities of bills of credit, as used in the Constitution, even although they might readily pass in payment of debts, or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope of the Act, the emission is a bill of credit, within the terms of the Constitution. To the many indications in the Act to show the intended design, which have been pointed out in the opinion of Justice Willard, it might be added, that the Revenue Bond Scrip could never have been intended or proposed as a State security for investment, because it bore no interest, and its value consisted in the fact of its ready capacity and facility in supplying all articles necessary for use or consumption. Its capacity for circulation and its easy convertibility, together with its adaptation to immediate and ready use, would cause a demand for it, which a State bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the State, the purpose was to furnish a fund for payment, and not a circulating medium. But may not the two co-exist? May not the medium of payment be of such a kind and character as to create in itself a circulating medium? It is not the end which the assumption is to accomplish, but the mode and manner designed and the use contemplated. The State might issue certificates of indebtedness for the redemption of its bonded debt; but if it did so in the form and manner and design proposed by the Act of 2d March, 1872, would they be less obnoxious to the objection urged against the Revenue Bond Scrip,

because they were issued to pay or meet a debt? It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach to it as a provision and recommendation for a circulating medium."

The opinion of Mr. Justice Willard, above referred to, after stating the definition of the terms "bills of credit," employed in the Constitution of the United States, as settled by this Court, in the cases of Craig vs. Missouri, 4 Peters, 490, and Briscoe vs. Bank, 11 Peters, 257, holds that the Certificates or Revenue Bond Scrip in question are within the definition—because:

1st. They are issued by a State in its sovereign capacity.

2d. That they were to contain a pledge of its faith; and

3d. That they were intended to circulate as money.

The first two propositions are determined by the terms of the Act which required the State Treasurer to issue paper, expressing that the sum therein mentioned is due by the State to the bearer thereof.

That it was the intention of the Act that this paper should circulate as money, is shown by the following considerations:

1st. It was intended that the Revenue Bond Scrip should be issued in the form most usual and convenient to serve as paper money, viz: that of the usual bank or treasury note. The form and denomination were to be determined by the Treasurer and the President of the Railroad Company. The Treasurer is to receive and pay it out from the Treasury, and the President of the Railroad Company is to receive it in such amounts as he should find most convenient for use.

2d. It is based on the credit of the State in its sovereign capacity.

3d. To give it currency, an artificial want is created by making it receivable for taxes.

4th. To keep it in circulation, the Treasurer is authorized to pay it out again after being received, in satisfaction of any claim against the Treasury, except for interest on the public debt.

5th. The pledge of the State is not that the scrip shall be paid, but that it shall be redeemed by means of funds to be raised by a special tax, thus increasing the inducement to give it currency.

6th. The volume of the issue, $1,800,000, as compared with the extent of the commercial transactions of the community in which it was to be placed, is the clearest indication of the intention to make it circulate as money. It was to be placed at once in private hands, and the various provisions of the Act looking to its distribution among the people, precludes the idea that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders; but the magnitude of the interest in the hands of the first receiver was such as to warrant the assumption that it would become diffused throughout the community.

7th. The authority conferred on those most concerned with its circulation, to issue it in such amounts as would adapt it to the wants of the community is an additional evidence of an intention that the scrip should circulate as money.

The decision in these cases was reconsidered and affirmed in the case of Gary, State Auditor, vs. Parker, State Treasurer, and others as County Treasurers in June, 1873, 4 S. C., 311, in which, by order of the Circuit Court, John P. Southern and others, scripholders, were allowed to intervene as defendants.

In the case of Poindexter vs. Greenhow, (114 U. S., 283-285,) it was decided by this Court that the coupons of the bonds of the State of Virginia, were not "bills of credit" in the sense of the Constitution of the United States, because, although issued by the State on its credit, and made receivable in payment of taxes, and negotiable, so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals and between Government and individuals, for the ordinary purposes of society. The definitions of "bills of credit," as determined in the cases of Craig vs. Missouri, 4 Peters, 410; Briscoe vs. Bank of Kentucky, 11 Peters 257, and Darrington vs. Bank of Alabama, 13 How., 12, are approved and applied:

"'Bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society,' or as made more exact: 'The definition which does include all classes of bills of credit emitted by the Colonies or States is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money;' and, again: 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.'"

The coupons were decided not to be bills of credit in the sense of the constitutional prohibition, because, although they are issued by the State, are promises to pay money, and their payment and redemption are based on the credit of the State; they were not issued by the State as a circulating medium or paper currency—as a substitute for money. The grounds upon which this conclusion as to the absence of intention to make the coupons a paper currency, are:

1st. There is nothing on the face of the instrument.

2d. Nor in their form and nature;

3d. Nor in the terms of the law which authorizes their issue;

4th. Nor in the circumstances of their creation or use;

5th. Their being made receivable in payment of taxes is not sufficient to give them this character. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all.

In what respects do the "South Carolina Treasury Certificates of Indebtedness, styled Revenue Bond Scrip," issued under the Act of 2d March, 1872, correspond with the coupons of the Virginia Bonds, and in what respects do they differ?

They correspond in that they are indebtedness, and obligations of the State; they are issued by the State in its sovereign character; they are made receivable for taxes, and their redemption is based entirely on the credit of the State, for as pointed out in the case of Darrington vs. Alabama, (13 How., 12,) although it is provided that a fund for their redemption shall be raised by taxation, the application of the fund so raised rests upon the faith of the State.

They differ in the following particulars:

1st. They are not made payable at any specific time, indeed made payable at all; but are only to be redeemed or retired from year to year (as in the instruments construed to be bills of credit in Craig vs. Missouri.)

2d. They are made receivable in payment of taxes from the time of issue, before even they are required to be redeemed; therein unlike the coupons, which were not receivable for taxes until they are due.

3d. They do not bear interest, being therein unlike coupons, and like Bank or Treasury notes.

4th. They are not only made receivable for taxes, but after they have been so received, may be reissued in satisfaction of all claims against the Treasury, (except for interest on the public debt.)

To determine whether these Treasury Certificates of Indebtedness, issued by the State of South Carolina, were intended to constitute a paper currency or circulating medium, constituting "bills of credit," apply to them the tests applied by the Court to the coupons of the Virginia bonds.

1st. The instruments on their face are bills receivable, or notes of the State of South Carolina.

2d. In their form and nature they correspond with the usual paper currency of the country. They are in the similitude of bank notes and Treasury notes.

3d. The terms of the law, which authorized their issue; by the provisions as to form; by the power given to fix the amount (which was exercised so as to issue notes in as small a denomination as $1.), by their not bearing interest, the placing them in the hands of the President of the Blue Ridge Railroad Company to take the place of the bonds of the Company, and to be used in paying the expenses of constructing the road; the great volume of the issue, which necessitated its being kept in circulation to sustain its value; the provision for its re-issue from the Treasury so often as received, which was to make it circulate and keep it afloat—all indicate the intention to create a paper medium to circulate between individuals and between the government and individuals, and to perform all the functions of money.

4th. The circumstances of their creation and use, as shown in the opinion of Judge Willard, and of the Supreme Court, cited above, are confirmatory of the same intention.

5th. Their being made receivable in payment of taxes from the time of their issue and before they became redeemable.

6th. Penalties are provided for forgery of Scrip, in like manner as for bank and Treasury notes, as was the case in the Act construed in Craig vs. Missouri.

In the case of The State vs. Cardozo, Treasurer, (5 S. C., 297), decided in 1874, the decision in the case of State ex rel Shiver vs. Hoge, as to "bills of credit," is affirmed; but it was held that the "Certificates of Indebtedness," the subject of that suit, were not bills of credit, although made receivable in payment of taxes, because the Act under which they were issued affords no evidence of the intention of the Legislature to create a currency or circulating medium. The certificates in no way increased the obligation of the State, and in fact only constituted another admission by the General Assembly of the particular debt, not paid by the certificate, but remaining due until its satisfcation was unconditionally acknowledged.

The learned Judge before whom this case was heard in the Circuit Court gave particular attention to this question, and decided the case in favor of the appellee upon it. The attention of the Court is respect-

fully called to his full consideration of the questions on pages 34 to 41, inclusive, of the record.

III.

The bonds of the Blue Ridge Railroad Company, in exchange for which said Revenue Bond Scrip was issued, were on their face, guaranteed by the State of South Carolina. This guaranty is unconstitutional and void, and its cancellation, and the surrender and cancellation of the bonds bearing it, furnished no consideration for the issue of said Revenue Bond Scrip. The appellant being a party to the transaction whereby said Scrip was used in exchange for said guaranteed bonds, was chargeable with full notice of the facts, and cannot enforce the Scrip received by him.

The guaranty by the State of the bonds of the Blue Ridge Railroad Company was made by virtue of the Act of 1868, "to authorize additional aid to the Blue Ridge Railroad Company in South Carolina."

1. If the object and intention of the act was to create a public debt of the State, it was void, because not passed by the votes of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays in the journals of each House respectively, and did not levy a tax annually, sufficient to pay the annual interest of such debt, as required by the Constiution of South Carolina. (Art. IX, Sec. 7.)

2. The Legislature had not authority, under the Constitution of the State (Art. IX., Sec. 14), to creat a debt in this form. (This will be discussed under the next point.)

3. The Act authorized the guaranty of the $3,000,000 of bonds only upon the express proviso that "the bonds shall not be used," unless upon the condition that Congress, or private capitalists, shall furnish $3,000,000, or so much as may be necessary in exchange, or upon the security of said bonds. This condition not having been performed, the guaranty of the State never took effect. All those purchasing the bonds of the Blue Ridge Railroad, purporting to be guaranteed by the State, were bound to take notice of the condition contained in the Act, which protected the bonds from being offered in the market at an under rate, and those, who took them at such under rate did not occupy the position of bona fide holders, without notice.

4. To remove this difficulty, the promoters of these schemes induced in the Legislature to pass the Act of 1871 "to promote the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company," which contained a section repealing this proviso. The repeal of the proviso was part and parcel of the plan to consolidate the two Companies, and the failure of the main object carried with it all the details.

This Act was considered by the Supreme Court of South Carolina, in the case of Gibbs vs. The Greenville and Columbia Railroad Com-

pany (13 S. C., 228), and it was held that "the Act was never accepted by the Greenville and Columbia Railroad Company, or its creditors, and never went into operation in whole or in part; that it must be construed as a whole, and that the object of the Act having failed, each and all of its parts also failed."

The proviso of the Act of 1868 was, therefore, never repealed.

5. The State of South Carolina having placed in the hands of the Blue Ridge Railroad Company, for the purpose of constructing its road, certain bonds, with its guaranty endorsed, with a condition attached to them, the object and effect of which was to prevent their being used until dollar for dollar could be had for them; no liability could accrue against the State upon such bonds until they were issued in pursuance of the condition; and they were delivered in violation of the said condition.

6. The bonds having been issued, in violation of this condition, there was no liability of the State which could create a consideration for the redelivery of them to the State.

The contract of the State, which is claimed to exist, and which is sought to be enforced, is to issue a paper medium of $1,800,000, more than the whole currency required for the State, and which is made receivable for taxes and all other dues to the State; and the effect of enforcing which will be to debase the currency of the State, subvert its financial system, and saddle its people with an enormous debt, for which it has received no equivalent.

And the only consideration claimed to support this contract is the re-delivery to the Treasury of the State, of the bonds illegally and fraudulently issued by the custodians who held them as Trustees.

The appellant, who took the illegal Revenue Bond Scrip in exchange for the illegally issued bonds of the Blue Ridge Railroad, which he had received with notice of the condition upon which alone they were to be used, and which condition was violated, is not entitled to the relief which is granted to bona fide holders of negotiable securities.

The question whether there existed any liability of the State because of its guaranty of the bonds of the Blue Ridge Railroad Company, is determined by the question whether the President of the Blue Ridge Railroad Company had the authority to use the said bonds as he did, the condition precedent upon which alone they were to be used not having been complied with.

The principles which apply to the transaction in question are clearly distinguished from those which have been decided by this Court in relation to bonds issued by counties and municipalities. In these latter cases, it has been decided that where the authority to issue the bonds depends upon the fact of the performance of some condition precedent, as e. g., the vote of the electors of the County, if the bonds contain the recital of that fact, and such recital is made by the persons appointed to decide whether the necessary prerequisite to their issue had been completed, their recital is such decision, and is equivalent to a representation or warranty or certificate on the part of the person so authorized, that every such fact necessary in law to have existed, did exist, to make the bond lawful and binding, and the obligors are estopped, by said recital, from denying the validity of the bonds. But even in such cases, "of course this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting

the actual facts, and that thereby the bonds were conformable to law, when judicially speaking they were not, will not make them so, nor can it work an estoppel."

(See Field vs. County of Dixon, 11 U. S., 83, in which all the preceding cases are reviewed.)

In the cases under consideration, the bonds used were the bonds of the Blue Ridge Railroad Company, which was the obligor; the Act of 1868 authorized the Comptroller-General of the State to endorse the guaranty of the State on said bonds, provided that said bonds, or any part thereof, shall not be used unless upon the express condition that, through the Congress of the United States, or private capitalists, a corresponding amount shall be subscribed. The endorsement of the guaranty of the Comptroller-General necessarily preceded the use of the bonds by the President of the Blue Ridge Railroad Company. The Act was in legal effect a special or limited power of attorney by the State of South Carolina to the President of the Blue Ridge Railroad Company to use certain negotiable instruments for which it was contingently liable, only upon the conditions and under the circumstances set forth in the Act which conferred the power. Those dealing with the agent knew that he was acting only by virtue of a delegated power, and were referred to the Act conferring the power. They were bound at their peril to determine whether the acts of the agent were within the scope of the power under which he acted.

The Act did not, as in the case of county bonds, appoint any one to decide that the facts constituting the condition precedent had been performed, and whose recital is such decision.

Nor did the bonds so used contain any recital that such condition had been performed, nor even that such condition had been prescribed. On the contrary, the bonds, although they had endorsed on them "Guaranteed by the State of South Carolina, under the Acts of 1854 and 1868," and recited that, by an Act passed in 1854, the State had granted aid to the said Company upon certain specified conditions, and that said conditions were released by the said Act of 1868, which authorized the guaranty of its bonds, without compliance with the conditions specified in the Act of 1854, the proviso in the Act of 1868, upon which alone the bonds so guaranteed were to be used, is not mentioned.

There was not only no recital that the condition precedent, prescribed by the Act of 1868, had been performed, but the fact that such condition existed was suppressed.

(A copy of one of the said Bonds, with the endorsements, is appended to the statement of facts filed herewith.)

The principles which determine the authority of an agent to issue negotiable paper in the name of the State, are the same as those which determine the authority of an agent who acts under the power of attorney of an individual.

"An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this power may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept, under given circumstances, defined in the instrument which confers the power. But in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated

power, must, at his peril, see that the paper on which he relies, comes within the power under which the agent acts.

"And this applies to every person who takes paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market, purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government."

The Floyd Acceptance, 7 Wall, 666.

"The holder is bound to ascertain whether the law had been so far followed by the officers as to justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holders."

Marsh vs. Fulton County, 10 Wall., 683.

"The purchaser is bound to know the law conferring the power to issue bonds on the happening of a contingency."

Town of Coloma vs. Eaves, 92 U. S., 490.

Field vs. County of Dixon, 11 U. S., 83.

Nor can the appellant sustain the position, that when receiving this Scrip from the State Treasurer and the President of the Blue Ridge Railroad Company, he was only called on to examine the Act of 1872, and that said Act "was a recognition by the State of South Carolina that the use that had been made of those bonds was proper, and thereby admitted the State's liability for them."

The recitals of the Act of 1872 were only the declaration by the Legislature that the existence of the $4,000,000 of bonds of the Blue Ridge Railroad Company, guaranteed under the provisions of the Act of 1868, created a liability upon the part of the State, which the Act proposed to meet by the issue of the Revenue Bond Scrip.

If the Act of 1868 was void, because not passed in accordance with the provisions of the Constitution of the State; or if by reason of the use made of these bonds by the Blue Ridge Railroad Company, in violation of the express condition upon which alone the Act authorized their use, the State did not incur a legal liability, as we have endeavored to show, then the declaration of the Legislature, contrary to the law and facts, that such liability existed, did not and could not create such liability against the State.

The recital in the Act of 1872, that there existed a valid liability of the State, because of its guaranty of the Blue Ridge Railroad Bonds, was based upon the assumption that the provision, the compliance with which was a necessary condition precedent to the accrual of the liability, had been repealed, when in fact as well as in law it had not been repealed.

The appellant when he took the Revenue Bond Scrip issued under the Act of 1872, in exchange for the bonds issued under the Act of 1868, was again given notice by the recital of the Act of 1868 in the Act of 1872, that the liability of the State upon its guaranty of those bonds rested upon the provisions of the Act of 1868, which Act was not passed

in accordance with the requirements of the Constitution, and an examination of which would have showed the condition upon which alone such guaranty was to take effect, and which condition had never been complied with or repealed.

If the guarantee of the State, endorsed by the Comptroller-General upon the bonds of the Blue Ridge Railroad Company, under the provisions of the Act of 1868, did not constitute a valid debt of the State, either because the said Act of 1868 was not passed in accordance with the provisions of the Constitution; or because of the non-performance of the express condition precedent prescribed in said Act, upon compliance with which only could the State become liable upon its guaranty; then the Legislature could not by the declaration in the Act of 2d March, 1872, that such antecedent liability did exist, create a debt which could be binding upon the State by way of compromise or otherwise; for this would be to convert what was without legal authority into a valid obligation; and thus create a debt in a mode other than that authorized by the Constitution.

This would be to ignore the vital distinction between a State and the Legislature of a State, and to hold that the very body whose power to contract debt is restricted by the Constitutional proviso, could, by these means, evade and utterly disregard such restrictions.

(See Bond Debt Cases, 12 S. C., 201; Whaley vs. Gaillard, County Treasurer, 21 S. C., 560, and cases cited.)

IV.

The Act of March, 1872, is null and void, because in violation of the Constitution of the State of South Carolina.

The whole department of finance is settled by Article IX, of the State Constitution—"Finance and Taxation." The expenses and expenditures of the State are divided into two classes: "ordinary" and "extraordinary." The provisions for ordinary expenses are contained in Sections 3 and 4.

The provisions in relation to extraordinary expenditures are as follows:

Sec. 7. "For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays in the journals of each House respectively; and every such law shall levy a tax, annually, sufficient to pay the annual interest of such debt.

Sec. 10. No Scrip, certificate, or other evidence of State indebtedness, shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution.

Sec. 14. Any debt contracted by the State shall be by loan on State bonds, of amounts not less than Fifty Dollars each, on interest payable within twenty years after the final passage of the law authorizing such debts. A correct registry of all such bonds shall be kept by the Treasurer in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally payable.

These several sections have been construed by the Supreme Court of the State of South Carolina.

(See State vs. Hayne, 4 S. C., 403; State vs. Columbia, 6 S. C., 1; The Bond Debt Cases, 12 S. C., 200; Whaley vs. Gaillard, County Treasurer, 21 S. C., 560.)

1st. The object proposed to be provided for by the Act of 1872, does not fall under the head of "extraordinary expenditures."

The declared object of the Act was to procure the cancelling of a guaranty by the State on certain bonds of the Blue Ridge Railroad Company, and the re-delivery of said bonds.

It is contended that it was to save the State from a liability, but a guaranty on a bond can in no sense be called an "Expenditure," and the Legislature had no authority to create a debt by guaranty. Their power was limited to creating debt for expenditures, and there was no expenditure in the case.

We submit that the guaranty on the bonds of the Blue Ridge Railroad Company, authorized by the Act of 1868, was unconstitutional and void, and could form no ground of debt or expenditure for the Act 2nd March, 1872, to operate upon.

2d. Section 10 authorizes the issue of "scrip, certificate, or other evidence of State indebtedness," only for the redemption of stock, bonds, or other evidence of indebtedness "previously issued," or for such debts as are expressly authorized by the Constitution; the first clause refers to evidence of indebtedness issued previous to the adoption of the Constitution; second clause refers to debt other than such as was provided for in Section 7.

The guaranty of the State on the bonds of the Blue Ridge Railroad, not then due, even if constitutional, created only a contingent liability, not yet a debt—and cannot be considered evidence of indebtedness. So that the "scrip" was not for the redemption of stock, bonds or other evidence of indebtedness previously issued, or authorized by the Constitution, and therefore cannot be sustained under Section 10.

3d. The limitations as to the form of the debt prescribed in Section 14, are wholly disregarded. The scrip is not a bond, but a bill receivable. It is for amounts less than $50; it is not on interest; it is not payable within twenty years from the passage of the law, and is not made payable at any date; it has not been registered by the Treasurer.

V.

The Acts of 22d October 1873, and 22d December, 1873 which prevented the execution of the provisions of the Act of 2d March, 1872,

were passed by the Legislature of South Carolina after the Supreme Court of the State had declared that the said Act was unconstitutional and void. (Auditor vs. Treasurer, 4 S. C., 311.)

They constitute part of the general policy and plan adopted by the State in the management of her finances.

If the Act of 2d March, 1872, is void, as we have endeavored to show in this argument, the Acts repealing its provisions, or inconsistent with them, are not unconstitutional and void.

The appellee therefore submits, that the so-called Revenue Bond Scrip did not constitute, in the hands of the plaintiff or of Mr. Alexander, his agent, the valid obligation of the State of South Carolina, at the time the same was tendered; that consequently said tender did not extinguish the lien of the mortgage upon the premises in the Bill described; that said mortgage is still in force and constitutes a lien upon said premises, and that, under his contract with appellant, he was justified in refusing to accept a deed of said premises and make payment therefor as in his contract provided. Having justifiably declined to carry out his contract for good causes then existing, the appellee cannot now be forced to do so, and he should therefore be dismissed with his reasonable costs.

All of which is respectfully submitted,

A. ST. J. NEWBERRY,
Solicitor for Appellee.

Supreme Court of the United States, 1

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY,
Appellant,

vs.

HOWARD P. EELLS.

Motion. 2

Now comes J. D. M. Shaw, a citizen and taxpayer of the State of South Carolina, acting on behalf of himself only, by William A. Barber, his attorney, and respectfully moves the Court for an order allowing him to file such brief and submit such argument in this case as may appear essential to a full and complete presentation of the question involved herein, as the same affects his interest.

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw for
the purpose of this motion.

3

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No 176.

EDWARD B. WESLEY,
Appellant,

vs.

HOWARD P. EELLS.

Notice.

To Messrs. Wm. H. Lyles, J. M. Shallenberger and A. St. J. Newberry, counsel of record in the above stated case:

Please take notice that on Monday, the 15th day of January, A. D. 1900, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States at Washington, D. C., for the decision of said Court thereon.

Annexed hereto is a statement of facts to be submitted with said motion in support thereof.

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw for purpose of this motion.

STATEMENT.

J. D. M. Shaw, on whose behalf this motion is submitted, is a citizen and taxpayer of the County of Laurens, in the State of South Carolina.

This case is not a *bona fide* effort on the part of appellant to compel the respondent to comply with a contract for the purchase of the property in Columbia, South Carolina, described in the bill as "Agricultural Hall." It is an effort to get from this Court an opinion as to the validity of an alleged obligation of the State of South Carolina. By the pleadings this is made the sole question. As a taxpayer in that State, J. D. M. Shaw is manifestly interested in the result.

Whatever decision may be rendered upon that issue, the rights of the parties under the alleged contract, upon which this case is based, will not be affected by it.

When the appellant bought the Agricultural Hall in 1892, he did so for the sole purpose of testing the validity of the scrip now in question. This was the testimony of W. H. Lyles, Esquire, in the case of Tindal *v.* Wesley *et al.* See 167 U. S., 207:

"Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment in revenue bond scrip? A. Yes. Q. Did you happen to know whether the (209) revenue bond scrip had any value in the market? A. I don't know. Q. It has not? A. I don't know that it has. Q. Very little, if any? A. Yes. Q. You know Alexander? A. Yes; I have never seen him personally. Q. Do you know him as a poor man? A. Yes. Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay, he would not lose the money. Q. Mr. Wesley holds a large block of revenue bond scrip? A. Yes."

The decision in that case awarding possession of the premises to Mr. Wesley was rendered May 10, 1897.

10 The bill in this case alleges the date of the contract between Mr. Wesley and Mr. Eells as the day of , 1897. No copy of this contract appears in the pleadings or testimony. Of course, its execution is duly admitted by the defendant.

This suit was filed on the 19th day of January, 1898 (see transcript, fol. 14). The bill had been verified on the 27th day of December, 1897, and on the next day, the 28th, the defendant waived service of process and entered his appearance (see transcript, fol. 13).

Answer was filed February 3, 1898, and replication made on the next day, February 4th (see transcript, fols. 21–23).

11 On the following day, the 5th of February, counsel for both parties filed a stipulation to submit the case on documentary evidence and written arguments, the same being accompanied by a memorandum of the evidence introduced (see transcript, fol. 51). The transcript does not show the date on which the case was submitted, but the opinion of the Court was filed on the 14th day of November, 1898 (see transcript, fol. 73).

The recital of these dates is made because of the following facts:

On the 18th day of February, 1898, the Governor of South Carolina approved an act, duly passed by
12 the General Assembly, entitled "An Act to Define the Rights of the Sinking Fund Commission as to Unpaid Tax Claims, Forfeited and other Lands in the Control of the said Commission, and for the Management of the Same, and the Disposition of Other Assets." Section XI. is as follows:

"The said Commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia, known as 'Agricultural Hall,' executed to secure the same, which were given to secure the unpaid purchase money on said property, and which are now in the hands of the State Treasurer."

The Commissioners of the Sinking Fund met on 13
the 21st day of February, 1898, of which meeting the minutes are as follows:

" COLUMBIA, S. C., February 21, 1898.

The Board of Commissioners of the Sinking Fund met this day at 12 M. in the Office of the Secretary of State. Present:

W. H. Ellerbe, Governor; W. A. Barber, Attorney-General; J. P. Derham, Comptroller-General; W. H. Timmerman, State Treasurer; J. P. Thomas, Jr., Chr. H. W. & M. Com.; G. L. Buist, Ch. Senate Finance Com.

Upon motion, it was Ordered: Pursuant to author
ity conferred by Section XI. of an Act, entitled, 'An 14
Act to Define the Rights of the Sinking Fund Commission as to unpaid Tax Claims, Forfeited and Other Lands, in the Contrrol of the said Commission, and for the management of the same, and the Disposition of Other Assets,' approved Feby. 18, 1898.

Resolved, That the Commisssion deem it advisable that the Bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money, for the property in Columbia, known as the 'Agricultural Hall,' be cancelled and the said property be discharged from the lien of the mortgage executed to secure the same.

Whereupon the Board then signed and executed the 15
instrument, of which the paper pasted below is a true copy:

STATE OF SOUTH CAROLINA:

KNOW ALL MEN BY THESE PRESENTS, That the Commissioners of the Sinking Fund, pursuant to authority conferred by Section XI. of an Act, entitled, 'An Act to define the Rights of the Sinking Fund Commission as to unpaid Tax Claims, Forfeited and Other Lands in the Control of said Commission, and for the Management of the same, and the Disposi-

16 tion of other Assets,' approved February 18, 1898, and a resolution this day passed thereunder, hereby cancel the bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money for the property in Columbia known as the 'Agricultural Hall,' and discharge said property from the lien of the mortgages executed to secure the same.

Said Section XI. of the Act approved February 18, 1898, reads as follows: That the said Commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia, known as the 'Agricultural Hall,' exe-
17 cuted to secure the same, which were given to secure the unpaid purchase money on said property, and which are now in the hands of the State Treasurer.

Witness the hands and seals of the Commissioners of the Sinking Fund this twenty-first day of February, A. D. 1898.

Executed in the presence of:

N. W. BROOKER.
D. H. MEANS.

W. H. ELLERBE,
Governor. [L. S.]

18 W. H. TIMMERMAN,
State Treasurer. [L. S.]

GEORGE L. BUIST,
Ch. Senate Fin. Com. [L. S.]

J. P. DERHAM,
Comptroller-General. [L. S.]

JNO. P. THOMAS,
Ch. H. W. & M. Com. [L. S.]

WM. A. BARBER,
Attorney-General. [L. S.]

STATE OF SOUTH CAROLINA, }
Richland County. } 19

Personally appeared before me N. W. Brooker and made oath: That he saw the within named W. H. Ellerbe, Governor; W. H. Timmerman, State Treasurer; Geo. L. Buist, Chairman Senate Finance Committee; J. P. Derham, Comptroller-General; Jno. P. Thomas, Jr., Chairman House Ways and Means Committee, and Wm. A. Barber, Attorney-General, sign, seal and as their act and deed execute the within written instrument, and that he with D. H. Means witnessed the execution thereof.

N. W. BROOKER.

Sworn to before me this 21st }
day of February, 1898. } 20

D. H. MEANS,
Notary Public. [L. S.]"

Due notice of this action was given to all the parties interested, and the release was promptly recorded in the office R. M. C. for Richland County in R. E. Mtg. Book " A " " A," page 203. Proper certificates of these facts are filed with the Clerk of this Court.

Now note the dates and ask why was this cancellation not brought to the attention of the Circuit Court? More than seven months elapsed after the action of the General Assembly and the Sinking Fund Commission before this case was submitted. 21
During this time there stood the answer of Mr Eells setting up this mortgage, and yet Mr. Wesley made no effort whatever to apprise the Court of its cancellation. Worse still both parties permitted the Court to consider the case and render a decree, well knowing that, with the property discharged from the lien of the mortgage nothing but a moot question remained. Were they acting *bona fide?* When the Circuit Court held the Scrip invalid and the tender void we find Mr. Wesley appealing to this Court, with yet no suggestion that the mortgage is not in existence. They have already had the Circuit

22 Court to decide the case without giving all the facts and now would apparently have this Court do likewise. Is this suggestive of collusion? Has the jurisdiction of the Circuit Court been imposed upon? As between Mr. Wesley and Mr. Eells is there any practical question for this Court?

Then is not this whole case a collusive effort by these parties to have this Court in an agreed case between them decide an alleged liability of the State of South Carolina? Is it not a collusive effort to have the Court "declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it?" Mr. Lyles testified in the outset that the
23 "Agricultural Hall" was purchased with the sole object of testing that liability. This was manifestly also "the sole object" of the alleged sale to Mr. Eells—of Mr. Wesley's bill for specific performance—of Mr. Eells' acceptance of service and entry of appearance before the bill was filed—of the single issue made by the answer—of the submission of the case under stipulation—of no effort by either party to apprise the Circuit Court that the mortgage was duly canceled and satisfied and of the appeal to this Court.

No decision that the Court may render as to the validity of the Blue Ridge Bond Scrip can now affect the rights of these parties under the alleged
24 contract over which they claim to be litigating.

The taxpayer of the State of South Carolina and not the litigant in Ohio is the party whose interest is really involved in this controversy. The Court is, therefore, asked to permit the petitioner to file such brief and submit such argument as he may desire if the question affecting him is to be decided.

Respectfully submitted,

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 176.

EDWARD B. WESLEY

vs.

HOWARD P. ELLIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

WILLIAM A. HARPER,

Appearing as Amicus Curiæ.

BRIEF OF WILLIAM A. BARBER, FILED BY LEAVE OF THE COURT.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY,
Appellant,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

WILLIAM A. BARBER,
Appearing as *Amicus Curiæ*.

Statement.

Prior to the 16th day of February, 1892, the State of South Carolina was the owner, in fee simple, of the lot and building in the City of Columbia, in said State,

known as "Agricultural Hall." Pursuant to an Act of the General Assembly, previously passed, the Commissioners of the Sinking Fund of said State, on the 2d day of February, 1892, caused said premises to be sold upon terms of one-third of the purchase price in cash and the balance in two equal annual instalments, the deferred payments to be secured by the bond of the purchaser and mortgage of the premises, with option to the obligor to pay the whole or any part of such deferred payments at any time before the maturity thereof.

At this sale, one J. W. Alexander, a citizen of the State of North Carolina, became the purchaser, and it has since developed that he was acting in the interest of Edward B. Wesley, the appellant herein. The cash payment was made and J. W. Alexander delivered to the State Treasurer his bond and mortgage of the premises to secure the deferred payments. Immediately thereafter, he tendered to the State Treasurer the amount of such deferred payments in Revenue Bond Scrip. Recognizing it as invalid and worthless, the State declined to give the purchaser possession of the premises. On the 11th day of February, 1893, J. W. Alexander conveyed the said premises to Edward B. Wesley, in fee simple. Thereupon, on the 13th day of February, 1893, the said Edward B. Wesley filed suit in the Circuit Court of the United States for the District of South Carolina against J. E. Tindal and J. R. Boyles, the custodians of the premises involved, and asked judgment: (1) For possession of said premises; (2) For ten thousand dollars damages; (3) For the value of the use and occupancy of the premises; (4) For costs. After much litigation this Court rendered its decision in the case on the 10th day of May, 1897, awarding possession of the premises to the said Edward B. Wesley (Tindal *et al. vs.* Edward B. Wesley, 167 U. S. 204). Subsequently, an issue was raised by S. W. Vance and decided in favor of Edward B. Wesley by the Circuit Court of Appeals for the Fourth Circuit on

the 1st day of February, 1898 (Vance *vs.* Wesley, 85 Fed. Rep., 157).

When the last-named decision was rendered, the General Assembly of South Carolina was in session and promptly conferred upon the Sinking Fund Commission power to dispose of the bond and mortgage above referred to, so a complete settlement might be made.

This authority was conferred in an act, entitled "An Act to define the rights of the Sinking Fund Commission as to unpaid tax claims, forfeited and other lands in the control of said commission, for the management of the same and the disposition of other assets," approved February 18, 1898. Section XI is as follows:

"The said commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia known as 'Agricultural Hall,' executed to secure the same, which were given to secure the un paid purchase money on said property, and which are now in the hands of the State Treasurer."

Suit had previously been entered on the supersedeas bonds executed in the case of Edward B. Wesley *vs.* J. E. Tindal and J. R. Boyles, and it was desirable to settle these claims, together with the amount alleged to be due for use and occupancy of the premises pending the long litigation. Authority to settle costs and damages resulting from the litigation had been given to the Sinking Fund Commission by a joint resolution, passed March 2d, 1897, and a concurrent resolution passed at the session of 1898. This settlement was agreed upon between the Commissioners of the Sinking Fund and Mr. W. H. Lyles, representing Mr. Wesley on the 12th day of February, 1898, and Mr. Lyles was paid the sum of ten thousand dollars on that date.

The Commissioners of the Sinking Fund met on the 21st day of February, 1898, of which meeting the minutes are as follows:

"COLUMBIA, S. C., Feb. 21, 1898.

The Board of Commissioners of the Sinking Fund met this day at 12 M. in the office of the Secretary of State. Present: W. H. Ellerbe, Governor; W. A. Barber, Attorney-General; J. P. Derham, Comptroller-General; W. H. Timmerman, State Treasurer; J. P. Thomas, Jr., Chr. H. W. & M. Com.; G. L. Buist, Ch. Senate Finance Com.

Upon motion, it was ordered: Pursuant to authority conferred by Section XI of an Act, entitled, "An Act to Define the Rights of the Sinking Fund Commission as to Unpaid Tax Claims, Forfeited and Other Lands, in the Control of the said Commission, and for the Management of the Same, and the Disposition of Other Assets," approved Feby. 18, 1898.

Resolved, That the Commissioners deem it advisable that the Bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money, for the property in Columbia, known as the "Agricultural Hall," be cancelled and the said property be discharged from the lien of the mortgage executed to secure the same.

Whereupon the Board then signed and executed the instrument, of which the paper pasted below is a true copy:

STATE OF SOUTH CAROLINA:

KNOW ALL MEN BY THESE PRESENTS, That the Commissioners of the Sinking Fund, pursuant to authority conferred by Section XI of an Act entitled, "An Act to define the Rights of the Sinking Fund Commission as to Unpaid Tax Claims, Forfeited and Other Lands in the Control of said Commission, and for the Management of the same, and the Disposition of Other Assets," approved February 18, 1898, and a Resolution this day passed thereunder, hereby cancel the bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money

for the property in Columbia known as the "Agricultural Hall" and discharge said property from the lien of the mortgages executed to secure the same.

Said Section XI of the Act approved February 18, 1898, reads as follows: That the said Commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia known as the "Agricultural Hall," executed to secure the same, which were given to secure the unpaid purchase money on said property, and which are now in the hands of the State Treasurer.

Witness the hands and seals of the Commissioners of the Sinking Fund this 21st day of February A. D. 1898.

Executed in the presence of:

N. W. BROOKER,
D. H. MEANS.

W. H. ELLERBE, Governor, [L. S.]
W. H. TIMMERMAN, State Treasurer, [L. S.]
GEORGE L. BUIST, Ch. Senate Fin. Com., [L. S.]
J. P. DERHAM, Comptroller-General, [L. S.]
JNO. P. THOMAS, Ch. H. W. & M. Com., [L. S.]
WM. A. BARBER, Attorney-General. [L. S.]

STATE OF SOUTH CAROLINA,
Richland County.

Personally appeared before me N. W. Brooker and made oath: That he saw the within-named W. H. Ellerbe, Governor; W. H. Timmerman, State Treasurer; Geo. L. Buist, Ch. Senate Fin. Com.; J. P. Derham, Comptroller-General; Jno. P. Thomas, Jr., Ch. House W. & M. Com., and Wm. A. Barber, Attorney-General, sign, seal and as their act and deed execute the within

written instrument, and that he with D. H. Means witnessed the execution thereof.

N. W. BROOKER.

Sworn to before me this 21st day of February, 1898.

D. H. MEANS,
Notary Public. [L. S.]

Due notice of this action was given to all parties interested, and the Resolution was recorded in the office R. M. C. for Richland County in R. E. Mortgage Book "AA," page 203. The satisfaction was also entered on the record of the mortgage itself.

Pending this, during the year 1897, it is alleged that Edward B. Wesley entered into a contract for the sale of the "Agricultural Hall" property to Howard P. Eells, a citizen of the State of Ohio. It is, perhaps, significant that in his bill in this case Mr. Wesley alleges the date of this contract as day of , 1897. Speculation as to this lacking date is somewhat relieved by the statement on behalf of Mr. Wesley in opposition to the motion of J. D. M. Shaw for leave to file brief. This statement says that the contract was entered into in October, 1897 (see statement filed January 15th, 1900, page 9).

This suit was filed on the 19th day of January, 1898 (see transcript, fol. 14). The bill had been verified on the 27th day of December, 1897, and on the next day, the 28th, the defendant waived service of process and entered his appearance (see transcript, fol. 13).

Answer was filed February 3, 1898, and replication made on the next day, February 4th (see transcript, fols. 21-23).

On the following day, the 5th of February, counsel for both parties filed a stipulation to submit the case on documentary evidence and written arguments, the same being accompanied by a memorandum of the evidence introduced (see transcript, fol. 51). The transcript

does not show the date on which the case was submitted, but the opinion of the Court was filed on the 14th day of November, 1898 (see transcript, fol. 73).

So far as the record discloses, the Circuit Court was not apprised of the action of the General Assembly and the Commissioners of the Sinking Fund in cancelling and satisfying the mortgage in dispute. In fact, it is tacitly admitted by counsel on both sides in their statements filed in this Court on the 15th of January, 1900, that the Court was permitted to decide their alleged controversy just as if the lien of the mortgage remained intact. Why this course was pursued is a suggestive question. Was it because they questioned the validity of the Act of the General Assembly? Was it that they doubted the effect of the cancellation and satisfaction? Can those who are benefited by an Act question its validity? Is it for Mr. Wesley, whose property was relieved from the lien of the mortgage to dispute the power of satisfaction? Why did Mr. Wesley not suggest the fact of this cancellation and satisfaction to the Circuit Court? Was he really seeking to enforce a contract with Mr. Eells? Was there any ground of controversy between them? Did the Circuit Court decide a real dispute? Is there any practical question before this Court? These seem to be proper questions before reaching the issue intended to be raised by the pleadings.

If all the facts we have recited, showing due cancellation and satisfaction of the mortgage, under express legislative authority to dispose of it, are passed over, and we reach the legal question intended to be made by the pleadings in this case, we must inquire: Is the Revenue Bond Scrip issued under the Act of March 2, 1872, a valid obligation of the State of South Carolina?

It is interesting to study the machinations by which this scrip was issued, and no less interesting to note that at the exact date of its issue, Mr. Wesley's name was prominently associated with the operation of the

legislative mill then engaged in grinding out "obligations of the State of South Carolina."

So far as we know, Mr. Wesley first appeared in South Carolina finances in January, 1872, connected with a scheme to adjust the State debt. Of his plan, "The South Carolinian," a contemporaneous newspaper, said:

"Mr. Wesley's plan assumes that the Scott-Parker statement of the bonded debt of the State is correct, Mr. Wesley's plan is, therefore, based upon that statement. The foundation is defective; and, again, the effect of Mr. Wesley's plan is substantially to cover up the frauds of the Financial Board, and to legalize the present bonds of the ring. The genuine bonds of the State and the fraud bonds are placed on the same footing."

The "Charleston News" about the same time said:

"'No compromise.' A few desperate speculators headed, we presume, by Mr. Wesley, are still struggling to give a spasmodic activity to their scheme for compromising with rascality by scaling the whole State debt, old and new, to fifty and seventy-five per cent. of its face. Neither Conservatives nor Radicals will consent to this precious scheme. The Radicals want to pay the whole debt; the Conservatives desire to pay as much of the debt as may prove to have been legally contracted."

On February 13th, 1872, Senator Nash presented to the General Assembly a petition on behalf of himself and others as owners of State Bonds, asking an issue of registered stock, in lieu of their bonds, at a fixed ratio, and, as we are informed, the first signature to the petition was E. B. Wesley as the owner of $100,000 in bonds of the State of South Carolina.

It is, therefore, error to suppose that Mr. Wesley was not interested in and familiar with South Carolina finances. It is equally erroneous to suppose that he was beguiled into taking the scrip he now holds. Notice

was given through the public prints that the property-owning class of citizens knew the Blue Ridge Railroad scheme was a swindle, but were powerless to prevent it. The first bill introduced in furtherance of it was entitled, "A bill to cancel the liability of the State of the guarantee of the bonds of the Blue Ridge Railroad Company." Portending the introduction of this bill, "The South Carolinian" in its issue of January 25, 1872 asks: "Is it true, as alleged, that the Legislature is to be called upon to assume the debt of the Blue Ridge Railroad Company—amounting to $600,000, so as to leave unencumbered the three and one-third millions of bonds guaranteed by the State? Is it true, as alleged, that the sum of $150,000 more or less is to be used by President Patterson in bribing the Legislature to do his work?"

"The Charleston News" thus commented on the bill: "The new Blue Ridge Bill is even more infamous in character than the telegraphic summary led us to believe. As everyone knows the Blue Ridge Railroad Company is head over ears in debt, and its only marketable assets are $4,000,000 of the bonds of the Company, guaranteed by the State which may be worth five cents on the dollar. Yet the new Blue Ridge Bill proposes: (1) That the State shall pay all the debts of the Company, upon delivery to the State of guaranteed bonds equal in amount to the debts presented for payment: (2) that the debts of the Company may be provided for by a sale of any bonds of the State to any amount; (3) that the debts of the Company may be exchanged for State Bonds at market rates; (4) that an indefinite amount of State bonds may be issued and sold to pay the debts of the Company; (5) that the worthless guaranteed bonds may be converted or funded under any conversion act into direct bonds of the State."

The editor adds: "We undertake to say that a greater swindle was never submitted to the South Carolina Legislature."

This bill was indefinitely postponed apparently only

to make way for a second bill which finally passed and became the Act under which the Scrip in question was issued.

"The South Carolinian" of Feb. 14, 1872, said: "We learn that the second effort of the Blue Ridge ring is likely to succeed. Patterson has been heard to say that the Legislature would have to succumb to him. He knows the power of money. We presume that the corrupt legislative majority yielded to his money. When the Blue Ridge project first originated, we understood that President Patterson proposed to devote a certain sum to the buying up of the legislative money slaves. On yesterday there passed to its second reading a bill to relieve the State of South Carolina of all liability for its guarantee of the bonds of the Blue Ridge Company by providing for the securing and destruction of the same. The bill passed to its second reading by a vote of about 77 to 22. The consensus of opinion is that it involves a huge swindle. It authorizes the issuing of treasury certificates of indebtedness, called "Revenue Bond Scrip" to the extent of $1,800,000. We have not time now to allude to other features, except to remark that provision is made for an annual tax of three mills on the dollar in addition to all other taxes, for the purpose of carrying out this nice job of Patterson & Co.

The $1,800,000 is to be placed at the disposal of the ring.

The bill is called a bill to relieve the State. It might more properly be called a bill to put money in the pockets of the ring."

In both Houses it was openly charged that this bill was being passed by bribery and corruption. Could Mr. Wesley have been ignorant of the doings of the Legislature?

Subsequent events proved that the rumors of bribery were well founded. The Act was passed on March 2nd. Two days later John J. Patterson wrote a letter to the State Treasurer, as follows:

" Vice-President's Office,

GREENVILLE & COLUMBIA RAILROAD COMPANY,

COLUMBIA, S. C. March 4, 1872.

Hon. NILES G. PARKER,
State Treasurer, South Carolina:

Please deliver to H. H. Kimpton 'revenue bond scrip' due the Blue Ridge Railroad Company according to Act passed March 2d, 1872 amounting to one hundred and fourteen thousand two hundred and fifty dollars, at par. upon the following conditions: That forty-two thousand eight hundred and fifty-seven dollars of said scrip, at par, is to be used for paying the expenses of passing through the House of Representatives Bills styled 'A Bill relating to the bonds of the State of South Carolina,' and 'Bill to authorize the Financial Board to settle the accounts of the Financial Agent.' Now, if these above named Bills are passed and become laws, this order for forty-two thousand, eight hundred and fifty-seven dollars in scrip at par, is to be paid said Kimpton; and if not passed, then this order for that amount to be void and the scrip is not to be delivered. Also that seventy-one thousand four hundred and fourteen dollars at par, you shall deliver to said Kimpton if said Bills become laws, and provided that he shall pay the sum of fifty thousand dollars, the proceeds of said scrip at seventy cents on the dollar, in paying the expenses already incurred in passing through the Senate the Bill known as 'A Bill to relieve the State of all liability on account of guaranty of Blue Ridge Railroad Bonds,' &c., passed March 2, 1872, which said expense said Kimpton has contracted to pay; and if said Kimpton fails or refuses to pay said amounts in defraying said expenses (when required by me) then this order to be void. If said conditions are complied with and the amount of scrip delivered to said Kimpton, he is not to be held liable for or to account for its value. The above two

sums of $42,859 and $74,414 in scrip at par, making up the amount of scrip first mentioned in this order.

JOHN J. PATTERSON,
President Blue Ridge Railroad Company in S. C.

Witness:
R. B. ELLIOTT."

The original of this letter was furnished by Niles G. Parker to an investigating committee in 1877. (See Reports and Resolutions of South Carolina, 1877–78, page 1625, *et seq.*)

Such were the history of the times and circumstances of the enactment under which Mr. Wesley's claim arose.

The revenue bond scrip issued under the Act of March 2, 1872, are bills of credit in violation of Article I, Section 10 of the Constitution of the United States.

This section provides: "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

The earliest definition by this Court of what are "Bills of Credit" within the meaning of the Constitution is found in the decision of Mr. Chief Justice MARSHALL in *Craig et al.* vs. *State of Missouri*, 4th Peters, 410. He says:

"What is a bill of credit? What did the Constitution mean to forbid? In its enlarged, and perhaps in its literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to

pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent, and the bills emitted for this purpose have been frequently denominated bills of credit. During the War of our Revolution we were driven to this expedient, and necessity compelled us to use it to a most fearful extent. The term has acquired no appropriate meaning; and 'bills of credit' signify a paper medium intended to circulate between individuals and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interests and prosperity of all, the people declared in their Constitution that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium

by a State government for the purpose of common circulation."

In the case of *Briscoe* vs. *The Bank of the Commonwealth of Kentucky 11 Peters, 252*, Mr. Justice McLean undertook to reach a more concise definition of the term "bill of credit" as used in the Constitution by applying to the general definition given by Mr. Chief Justice Marshall in *Craig* vs. *Missouri, supra*, the limitations stated by two of the Justices who dissented in that case. He says:

"In the case of *Craig et al.* vs. *The State of Missouri* (4 Peters, 410), this Court was called upon for the first time to determine what constituted a bill of credit, within the meaning of the Constitution. A majority of the Judges in that case, in the language of the Chief Justice, say that bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

A definition so general as this would certainly embrace every description of paper which circulates as money.

Two of the dissenting Judges on that occasion gave a more definite, though perhaps a less accurate meaning of the terms bills of credit.

By one of them, it was said, "a bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." And, in the opinion of the other, it is said "to constitute a bill of credit, within the meaning of the Constitution, it must be issued by a State, and its circulation as money, enforced by statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future

period, on a time fixed or resting in its own discretion, will provide for the payment."

These definitions cover a large class of the bills of credit issued and circulated as money, but there are classes which they do not embrace; and it is believed that no definition short of a description of each class would be entirely free from objection, unless it be in the general terms used by the venerable and lamented Chief Justice.

The definition then which does include all classes of bills of credit emitted by the Colonies or States is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.

* * * * * * *

To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life."

In Woodruff vs. *Trapnall, 10 Howard, 190, and Darrington* v. *Bank of Alabama, 13 Howard, 12*, Mr. Justice MacLean in each instance delivered the opinion of the Court, affirming his definition of a "bill of credit" in *Briscoe* v. *Bank of the Commonwealth, supra.*

In *Poindexter* v. *Greenhow, 114 U. S., 270.*, the Court through Mr. Justice Matthews said:

"The meaning of the term "bills of credit" as used in the Constitution, has been settled by decisions of this Court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the War of Independence, in consequence of unrestrained issues by the Colonial and State governments of paper money, based alone upon credit. The definition thus deduced was not

founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests. Accordingly, Chief Justice MARSHALL, in *Craig* v. *Missouri*, *4 Pet.*, *410*, *432*, said that "bills of credit signify a paper medium intended to circulate between individuals and between government and individuals for the ordinary purposes of society." This definition was made more exact by merely expressing, however, its implications in *Briscoe* v. *Bank of Ky.*, *11 Peters*, *257*, *314*, where it was said: "The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money." And again (p. 318): "To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State and is so received and used in the ordinary business of life." This definition was repeated in *Darrington* v. *Bank of Ala.*, *13 How.*, *12*.

In these cases this Court has furnished an unquestionable standard by which to measure "bills of credit." The Supreme Court of South Carolina has found that the Blue Ridge Scrip now in question meets every requirement of this standard.

Attention is asked to the opinion of Mr. Justice Willard in *State, ex rel. Gary* vs. *Parker, Treasurer, and Dupre* v. *County Treasurers*, reported with *State ex rel. Shiver* v. *Comptroller-General*, 4 S. C., 229.

After stating the definition of "bills of credit" given by this Court, the opinion says:

"It remains then to inquire whether the obligations

contemplated by the Act under consideration are intended to have the following characteristics:

1st. That they are to be issued by a State in its sovereign character.

2nd. That they were to contain a pledge of its faith; and

3rd. That they were intended to circulate as money."

The first and second propositions are settled in the affirmative by the terms of Section 4, which provides, as we know, for a paper to be issued by the State Treasurer, importing to be an obligation on the part of the State to pay a certain sum of money to the bearer. It will, therefore, be necessary only to inquire whether it was the intention of the Act that this paper should circulate as money.

An inquiry of this nature calls into exercise one of the most important and responsible judicial powers incident to a constitutional government. It involves the examination of an Act of the Legislature, with the view of fixing the purpose and intent of the Legislature in the passage of such an Act, not merely as a means of effectuating such purpose and intent of the law-making power by means of the judicial authority, but for the purpose of testing the authority of the law-making power itself in the case, under the supreme law of the land.

The principles that should govern such an inquiry are well illustrated in the case of *Craig* v. *Missouri*, already referred to, and the mode in which they are there applied to a case remarkably similar to the one in hand marks out very clearly the line of inquiry appropriate to be pursued.

To fix this meaning of the term "money" it must be taken in the ordinary sense understood by the community in their mutual dealings. A strenuous attempt was made in the case of *Craig* v. *Missouri* and in

Briscoe v. *Bank* to limit the sense of the term "money" as entering into the question of what constitutes a bill of credit to the legal or technical sense of the term, which embraces only the legal coinage of the Company, and that which is its legal equivalent, or, in other words, is made legal tender; but that line of argument did not prevail.

The question properly stated, is whether a particular obligation is what the community regards and deals with as money. The answer to it is that whatever is current in a form convenient to pass from hand to hand and that may be used to pay debts or purchase commodities is, in this sense, money. It is not essential to such character that tender of payment in such substituted medium should have the force and effect of a legal tender, nor that it should have an actual capacity for paying debts and purchasing commodities equal to that of money possessing intrinsic or legal value. That which passes current as money may be depreciated without losing its character as money, and depreciation necessarily implies a diminished capacity for paying debts and purchasing commodities.

On the other hand it is not enough to characterize an obligation as money merely because certain individuals have found it convenient to use it in place of money in their mutual transactions. There must be a dealing in the medium as money by the community as such, although the extent to which such dealing by the community is carried is, perhaps, unimportant to the question.

There are certain characteristics that tend to adapt a paper expressing a promise to pay money or representing money value, to become current in the community as money. It must be in a form convenient to pass from hand to hand. It must be based either on the credit of a government, a corporation, or an individual, or an association of individuals, or upon a fund pledged and set apart for its redemption. It must either have undoubted credit, such as arises from its ready conver-

tibility into money value, or it must tend to supply some want natural or artificial, of the community in which it is intended for circulation. It must be placed upon the community in quantity or volume sufficient to create an adequate interest and motive to secure its currency; and, finally, it must have a certain denominational character adjusted to the wants of the community in respect to a circulating medium.

An examination of the Act in question will disclose a clear intent to clothe the obligations in question with the attributes fitting them for general circulation as money. These attributes will be considered in the order just stated.

1st. Was it intended that the Revenue Bond Scrip should be issued in a form convenient to pass from hand to hand in ordinary transactions of the community?

Section 3 gives to the scrip the form most usual and convenient to serve as paper money, viz.: that of the usual bank or Treasury note. It is to be printed or engraved on steel in such form and of such denominations as the State Treasurer and the President of the Blue Ridge Railroad Company shall determine. The object of referring this authority as to form and denomination to the Treasurer and the President of the Railroad Company, is obvious. The Treasurer is, by the Act, to receive and pay out from the treasury this scrip as money; and the President of the Railroad Company is to receive the scrip as the representative of his Company, and to realize from its employment, and they are most likely to know what qualities as to form and denomination would have the tendency to give the greatest currency to the scrip at the time of its issue. A certain discretion is left with them for such purpose. While the third section determines what shall be the substantial character of the scrip, as importing a pledge of the public faith and credit, the form of the instrument, as adapting it in external appearance to the common notion of money is left with those most concerned with its currency.

2d. It is to be based by the terms of the Act on the credit of the State government in its sovereign capacity.

3d. The Act attempts to confer upon it not only the full credit capable of being conferred by the use of the full faith and credit of the State, but to create an artificial want in the community, tending to give it currency. In the first place, it is made receivable in payment of taxes and all other dues to the State, except the special tax levied to pay interest on the public debt, (Sec. 3.) Again, it is provided that if any such scrip is received in the Treasury for the payment of taxes, the Treasurer is authorized to pay out the same in satisfaction of any claims against the Treasury except interest that may be due on the public debt (Sec. 5).

These provisions contain two distinct features: The first is a permissive feature affecting each individual in the community who is a tax payer, and supplying to him a motive to become a purchaser of the scrip. A more energetic means of creating an interest and motive in the community to deal with the scrip, as money, could not be offered short of making the scrip compulsory payment of all debts as between individuals. The other feature involves the communication to the scrip of the capacity of performing all the functions of money in all dealings between State and individuals, excepting only the case of the payment of interest on the public debt. This last feature can have no other significance than that of giving currency to the scrip as money.

It will be observed from the language of the 4th Section in which the faith and funds of the State are pledged that such is not in terms that such scrip shall be redeemed by the payment to the bearer on presentation of the amount of money called for by it, but the language is, "that the faith and funds of the State are hereby pledged for the ultimate redemption of said Revenue Bond Scrip."

It is only ultimate redemption, not payment on demand, that is covered by this pledge. What is meant

by ultimate redemption is made clear by the succeeding clauses of that section.

It is provided that a certain tax shall be annually levied for the redemption of the scrip, and it is also provided that the State Treasurer, shall "retire at the end of each year from their date one-fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be retired and to apply to such purpose exclusively the taxes hereby required to be levied." The effect of these provisions is that the holder of the scrip must not look to payment according to the tenor of his scrip, but must seek a market for its circulation under the influence of the pledge of faith and funds for its ultimate redemption. In other words an attempt is made to give currency to the issue, notwithstanding the absence of any intention or ability to redeem according to the tenor of the promise by obtaining a credit with the community for the amount of scrip put in circulation on the strength of certain special provisions and a general pledge of the faith and funds of the State for its ultimate redemption.

4th. The quantity or volume of the contemplated issue is such as tended to create a strong motive and interest in the community to keep the scrip in circulation as money. The amount $1,800,000, as compared with the extent of the commercial transactions of the community on which that amount was intended to be placed, affords the clearest indication of an intention so to affect the interest of the community as to secure its circulation as money. It was to be placed at once in private hands as valid obligations. The various provisions of the Act that looked to a distribution among the people preclude the idea that it was intended that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders. On the contrary it was clearly intended for dispersion, and the magnitude of the interest in the

hands of the first receivers of the scrip was sufficiently large to warrant the assumption that it would become thus diffused throughout the community.

5th. As it regards its adaptation in respect of denomination, we have already seen that authority was conferred on those most concerned with its circulation, to adapt the issue in that respect to the wants of the community. Such a provision shows additional evidence of an intent that the scrip should circulate as money.

Considering the Act in its entire aspect, as well as its integral parts, it is clear that the Legislature intended that the scrip should circulate as money, and that for this reason the provisions of the Act authorizing the issue of scrip are in conflict with the prohibitions of the Constitution of the United States,as to the emission of bills of credit by States."

This opinion was affirmed by the Supreme Court in *State ex rel. Shiver* v. *Comptroller General, supra* (see 4 S. C., 228). The Court says:

"A careful consideration induced by the large pecuniary interests involved in the question, together with the fact that provisions both of the State and United States Constitutions have been brought into its discussion, has satisfied us that the Act, so far as it authorizes the emission of revenue scrip, is in violation of the clause of the Constitution of the United States already referred to. The argument which holds it valid as a subsisting obligation, and repels the character of a bill of credit, under which it is classed by the respondent, seems to rest upon the fact that it was not designed to circulate as money. The opinion of Mr. Justice Willard in the *State ex rel. Gary* v. *Parker, Treasurer, and Dupre* v. *County Treasurers*, which was brought to our notice in the case before us, and which will be reported with it (*a*) is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community like money that it is to be

held a bill of credit, nor does the fact of currency so constitute it. A State might well make the coupons attached to its bonds receivable for taxes without subjecting them to the disabilities of bills of credit as used in the Constitution, even although they might readily pass in payment of debts or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope of the Act, the emission is a bill of credit within the terms of the Constitution. To the many indications in the Act to show the intended design, which have been pointed out in the opinion of Mr. Justice Willard, it might be added that the Revenue Bond Scrip could never have been intended or proposed as a State security for investment, because it bore no interest, and its value consisted in the fact of its ready capacity and facility in supplying all articles necessary for use or consumption. The capacity for circulation and its easy convertibility together with its adaptation to immediate and ready use, would cause a demand for it which a State Bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the State, the purpose was to furnish a fund for payment and not a circulating medium. But may not the two co-exist? May not the medium of payment be of such kind and character as to create in itself a circulating currency? It is not the end which the assumption is to accomplish, but the mode and manner designed and the use contemplated. The State might issue certificates of indebtedness for the redemption of its bonded debt, but if it did so in the form and manner and design proposed by the Act of March 2, 1872, would they be less obnoxious to the objection urged against the Revenue Bond Scrip, because they were issued to pay or meet a debt. It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach to it as a provision and recommendation for a circulating medium."

This decision was reaffirmed in *Auditor* v. *Treasurer*, 4 S. C., 311, and the principle announced again in *State* v. *Cardoza, Treasurer*, 5 S. C., 297.

The case of *Poindexter* v. *Greenhow*, *supra*, which was decided by this Court subsequent to the decision by the Supreme Court of South Carolina of the cases just stated, involved the validity of coupons from bonds of the State of Virginia, issued under the Funding Act of March 30, 1871. It was provided that these coupons should "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and that this should be expressed on their face. It was contended that these coupons were "bills of credit." After reaffirming the definitions of that term, the Court said :

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank—its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments nor in their form or nature, nor in the terms of the law which authorize their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate in the common transactions of business, as money, nor that in fact that they were so used. The only feature relied on to show such a design or to prove such a use, is that they are made receivable in payment of taxes and other dues to the State. From this it is argued that they would have obtained such a circulation from hand to hand as money as the demand for them based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a

representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy in *Woodruff* v. *Trapnall*, 10 How., 190, were by law receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so because they were not issued by the State and in its name, although the entire stock was owned by the State, which furnished the whole capital and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder ; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State Treasury and the tax payers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

From this decision and the preceding cases, we may deduce certain tests by which to determine whether the Revenue Bond Scrip are within the inhibition of Article I, Section 10. These cannot be better stated generally than was indicated by Mr. Justice WILLARD : (1) Were they issued by a State in its sovereign character? (2) Were they based upon the faith and credit of the State? (3) Were they intended to circulate as money?

As to the first two tests there can be no question; nor can investigation furnish but one answer to the last. Just as all the cases suggest the three general questions, so the decision in Poindexter *v.* Greenhow suggests the solution of the third. In that case the Court concluded that the coupons in question were not intended to circulate as money, because such intention was not indicated (*a*) by their face, form or nature; (*b*) by the terms of the law which authorized their issue; or (*c*) by the circumstances of their creation or use as shown by the record. Measure the Revenue Bond Scrip by these tests. His Honor the Circuit Judge did this and says:

"The scrip are on their face bills receivable of the State of South Carolina.

In their form and nature they are like bank and treasury notes. The terms of the law authorizing their issue show that they were intended for circulation between the Government and the people as money by the power given to the State Treasurer and the President of the Railroad Company to fix the amount of the scrip, which power was exercised so as to make the denomination as low as one dollar; by reason of them bearing no interest; by the provision as to the form of the scrip; the great volume of the issue; and the scrip being non-interest bearing, its circulation was necessary to sustain its value.

They could be used for the payment of taxes and other dues to the State from the date of their issue, and before any part of them were required to be redeemed or retired."

So we are left to the primary test of "legislative intention." This must control our conclusion (*Wilkinson* v. *Leland*, *2 Peters*, *627*; *Priestman* v. *United States*, *4 Dall.*, *28*; *United States* v. *Willberger*, *5 Wheat*, *76*; *Binney* v. *Chesapeake & O. Canal Co.*, *8 Pet.*, *214*).

Now let us examine the scrip more particularly with

reference to the "legislative intention" with which they were issued, applying the principles just announced.

(1.) *As to their face, form and nature:* In face and form they are bills receivable of the State of all denominations, and in size strikingly similar to an ordinary bank or treasury note. A *facsimile* of one of the certificates appears in the appendix to this brief and speaks for itself. In nature they are adapted to the performance of every function of money. They are given currency from the very date of their issue by being made receivable from any one in payment of taxes or dues at any time. Their currency is not destroyed by being delivered at the Treasury, but they remain with the Treasurer who is "authorized to pay out such revenue bond scrip in satisfaction of any claims against the Treasury, except for interest that may be due on the public debt." Circulation from citizen to citizen is secured by making them payable to bearer, and pledging the faith of the State for their ultimate redemption. Circulation from citizen to State and again from State to citizen is secured, first by making them receivable for taxes, and then by authorizing the Treasurer to pay them out in satisfaction of debts of the State. Thus, in face, form and nature they fill every requirement of a "paper medium intended to circulate between individuals and between government and individuals for the ordinary purposes of society."

(2.) *As to the terms of the law which authorized their issue*: "Treasury certificates of indebtedness" is the character impressed upon the scrip by the terms of the Act. The words "treasury certificates" in themselves may suggest something intended for currency, but the purpose with which they were issued, rather than the name given them, determines their validity.

Section 3 of the Act stands like a mirror completely reflecting the legislative intention:

"That to carry out the purposes of this Act, the State Treasurer is hereby authorized and required to have printed or engraved on steel, as soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the State of South Carolina, in such form and of such denomination as may be determined on by the State Treasurer and the President of the Blue Ridge Railroad Company, in South Carolina, to the amount of one million eight hundred thousand dollars, which revenue bond scrip shall be signed by the State Treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt."

An issue of treasury certificates, payable to bearer, in such form and of such denominations as the State Treasurer and the President of the Blue Ridge Railroad Company might determine.

The similitude of these certificates to ordinary bank or treasury notes may result more from its operation than from the express terms of the Act. We are told by this Court that in determining the validity of a statute, we may judge the motives of the legislators by looking beyond the terms of the enactment to its necessary and natural operation (*Soon Hing* v. *Crowley*, *113 U. S., 703*; *Minnesota* v. *Barber*, *136 U. S., 213*).

In the case of *Collins* v. *New Hampshire*, *171 U. S., 30*, *this* Court said:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

If the natural result of the operation of the law is a constitutional infringement, it is no less objectionable

than had the violation been expressed in the face of the Act.

Why delegate the power to fix the form and denomination of the scrip, unless it was that they might adjust them to the demands for a circulating medium, the better to serve the purpose of interested parties? How well they were adapted to the uses of money is shown by their form, size and shape and the wide range of denomination in which they were printed. These characteristics are but the natural result of the power and authority given to the State Treasurer and the President of the Railroad Company, and operate as strongly against its validity as if they were expressed in the terms of the enactment.

No record of the scrip was required and none was kept. How much was actually issued and the disposition of much of them, after delivery to the President of the Railroad Company, are matters of conjecture. It is safe to assume that at least $1,800,000 was issued and immediately put into circulation. By the terms of Section 4, the State Treasurer and all other public officers are required to receive the scrip in payment of all dues to the State, except the special tax levied to pay interest on the public debt, while Section 5 completes the scheme to perpetuate their circulation by authorizing the Treasurer to pay them out in satisfaction of ordinary claims against the Treasury.

Conscious that a new circulating medium had been created and in further effort to give it currency, the legislature undertook by Section 9 of the Act, to protect this new money against forgery and counterfeiting. Thus, the succeeding sections of the Act confirm the legislative intention reflected by Section 3. Giving significance and effect to every word and section, they harmonize with the whole enactment and guide us to the intention of the law maker.

Washington Market Co. v. *Hoffman, 101 U. S., 112; Platt* v. *Union Pac. Railroad Company, 99 U. S., 48; Kholsatt* v. *Murphy, 96 U. S., 153.*

(3.) *As to the circumstances of their creation, or use as shown by the record:* The circumstances of their creation are stated by counsel for respondents in *State, ex rel. Shiver* v. *Comptroller-General, 12 S. C., 220*, as follows:

"The statement of facts is very simple, and yet startling. The Legislature has directed the Comptroller-General to endorse in the name of the State, $4,000,000 bonds of the B. R. R. R. Co. This having been done, the Legislature or the Financial Board lends to the B. R. R. R. Co. $220,000 in money and takes a collateral security of $600,000 of said bonds. The B. R. R. R. Co. holds the balance of the bonds. None of these bonds are yet near due; the members of the Financial Board, or their agent, holds a large part as security for the State loan, and the State has a lien on the property of the Company. The Legislature then, at this stage, proceeds to release the B. R. R. R. Co. from liability for $220,000; releases it from the lien held by the State and pays to the B. R. R. R. Co. $1,800,000 in what these appellants are trying to make as good as money; to be let off from a liability contingent and remote in any event, and notoriously fictitious, under the view taken of it, at the time this Act was passed. These bonds could not be sold; they were worth nothing in the market; and had not been sold by the B. R. R. R. Co.; and if any besides the $600,000 held by the State Financial Board were deposited as collateral, the debt they were used to secure did not exceed $300,000."

In Smith v. *Townsend, 148 U. S., 490*, this Court said:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." * *

And by this Court, in *United States* v. *Union Pac. R. Co.*, 91 U. S., 72, 79, it was said that, "Courts, in

construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provisions in it" *Aldridge* v. *Williams*, *46 U. S., 3 How., 24; Preston* v. *Browder*, *14 U. S., Wheat, 120, and Platt* v. *Union Pac. R. Co., 99 U. S., 48, 64.*

The history of the times when they were issued, and the circumstances of their creation show an intention, inspired by bribery, to put in circulation an issue of State-made money sufficient to meet the demands of the Blue Ridge Railroad Company.

Finding the $4,000,000. of bonds issued under the Act of 1868 inadequate to their purpose, the promoters of the scheme proposed the return of those bonds, for which they found no sale, and the issuance of $1,800,000 "treasury certificates" in lieu of them. They needed something that would find easier circulation and more ready use than the bonds. If the bonds would not yield money, the next best thing the pillaging majority in the legislature could give them was something best adapted to the ordinary uses of money. Could they have found anything apparently better suited than the Revenue Bond Script? By an argument of some fifty thousand dollars, expended in bribery, the President of the Blue Ridge Railroad Company and his coadjutors succeeded in convincing the General Assembly that the Scrip should issue, and immediately they used $71,414 to reimburse those who furnished this substantial argument. These are the circumstances of the issue and at least an index to the use of the Scrip.

Thus, when measured by each and every test furnished by the decisions of this Court, the Act of March 2, 1872, indicates an intention that the Revenue Bond Scrip should circulate as money. By its terms and natural operation it contravenes Article I, Section 10 of the Federal Constitution.

The Act of March 2d, 1872, was in violation of the State Constitution of South Carolina.

This proposition has been submitted in every case involving the validity of the scrip, but has never been decided by any Court. It was fully and ably argued by counsel for Respondent in State *Ex Rel.* Shiver *vs.* Comptroller-General, 12 S. C., 185.

We are content to adopt mainly and briefly the line of argument there used.

The theory of the State Constitution of 1868 was that the Legislature is a body possessed of limited powers delegated to it by that Constitution. This theory finds expression in Article I, Section 41 as follows:

"The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people."

The powers delegated to the Legislature to contract debt and levy taxes are definitely fixed, to go beyond which authority was reserved by the people.

The Legislative powers relating to finance and taxation are found in Article IX. Sections 3 and 4 authorize provision for the ordinary expenses of the government, as follows:

"Section 3. The General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year; and whenever it shall happen that such ordinary expenses of the State for any year shall exceed the income of the State for such year, the General Assembly shall provide for levying a tax for the ensuing year sufficient with other sources of income to pay the deficiency of the preceding year together with the estimated expenses of the ensuing year.

Section 4. No tax shall be levied except in pursuance

of a law which shall distinctly state the object of the same; to which object such tax shall be applied."

Section 7 provides the method of defraying extraordinary expenditures, as follows:

"Section 7. For the purpose of defraying extraordinary expenditures, the State may contract public debts, but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the Journal of each House respectively; and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

Section 10 declares where certificates of indebtedness may be issued, as follows:

"Section 10. No scrip, certificate or other evidence of State indebtedness shall be issued except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution."

Section 14 provides for loans, as follows:

"Section 14. Any debt contracted by the State shall be by loan on State bonds of amounts not less than fifty dollars each, on interest payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all bonds shall be kept by the treasurer in numerical order, so as always to exhibit the number and amount unpaid and to whom severally made payable."

It will be observed that upon the power to levy taxes to defray extraordinary expenses, but little restriction is laid, while the power to create a debt for extraordinary expenditures is hedged about by most stringent provisions. The language of Section 7 is as if its authors

foresaw the danger from which the State subsequently suffered.

In this connection we cannot do better than to adopt and quote from the brief of Mr. Pope in *State ex rel. Shiver* v. *Comptroller-General, supra.*

"But when the Constitution is dealing with the power to borrow money, then it puts limitation upon limitation. Great danger was apprehended here and with reason.

1. It is directed that the cause of extraordinary expenditure shall be pointed out.

2. That the Act to become a law shall be passed by a two-thirds vote.

3. That a tax should be at once levied to keep down the interest.

All this appears in the 7th Section of the Ninth Article of the Constitution.

The next thing looked to by the Constitution was to the shape which the debt so contracted should assume. This is pointed out in 14th Section of the same Article. It shall be by bonds and bonds only; not by stock, not by scrip, but by bonds; and these bonds shall not be under a certain sum named, and shall not run longer than twenty years. Each bond shall be numbered and registered and the name of the party to whom the bond is made payable shall be recorded (*Vide* 14 Sec., 9th Art., Con. S. C). The Constitution of 1868 intends that the bonds of the State shall not be hawked about in the stock market.

The next thing that the Constitution looks to is, how the debt thus created and represented by bonds shall be redeemed? This is pointed out in the 10th Section of the same Article, where two things are provided for:

1. The old debts of the State, due before the adoption of the Constitution of 1868. 2. The debts expressly authorized in that Constitution, then under consideration. For the first, scrip may be issued to redeem

them; and for the second, scrip also when the debts created and in the shape of bonds, according to the Constitution, shall become due. If the State finds itself, at the day, not in funds to pay the bonds, and if the holders of the due bonds will not take new bonds issued as for a new debt, to replace the due bonds, then scrip may issue to redeem such due bonds.

In no other way can South Carolina now contract a debt and no scrip can be issued except to redeem such a constitutionally created debt by bond. The Ninth Article of the Constitution is intended to lead to this very result, viz.: To make it difficult for the legislature to involve the State in debt. Give us this Ninth Article of the Constitution of South Carolina in its purity, and we could ask no more. It is absolutely perfect, if enforced, to prevent extravagance and fraud.

Now, was the bond scrip ever a bond created under the limitations of the 7th and 14th Sections of the 9th Article of the Constitution? This will not even be pretended.

Having shown how only a debt can be created, our next duty is to show that no such debt ever existed; and more than that, no debt of any kind ever existed; and more than that, no liability ever existed; and more than that, no contingent liability ever existed on the part of the State. We propose to show that there never was a debt due by the State, at any time, upon which to bottom this revenue bond scrip, authorized (as it is said) by the Act of March 7, 1872.

This involves some reference to the legislation touching the Blue Ridge Railroad:

I.—We will commence with the Act of 1868 (*Vide* Act of that year 15th September, page 25, Sections 1, 2 and 4). That Act contained an express condition that the guaranty by the State of the bonds and the bonds themselves, should issue only in case the Congress of the United States or private capitalists should let the Road have $3,000,000 for $3,000,000 worth of bonds or a less

sum at the same rate ; in other words, every dollar of bonds was to secure and bring in a dollar of money (*Vide* the proviso in the Act). This was a public Act, and this condition went out with the bonds. Trapnel's case is authority on this point.

This Act, we say, created no debt by the State. There was not even a contingent liability until dollar for dollar was realized upon the bonds. Even then there could be no "debt" of the State ; and for the first time, the transaction would assume the shape of conditional liability. The Legislature did not regard the Act of 1868 as creating any debt, because they provided no tax to meet the interest, as they were compelled to do, if the Act created a debt (*Vide* Section 7, Article IX, Constitution 1868).

The bonds were prepared and the State endorsed them. They were useless. The State was a guarantor upon condition. The company could not get one dollar of money for one dollar of bonds. With this condition unperformed, the State could at any time withdraw its conditional accommodation guaranty. When, therefore, the Act of 1872 was proposed to the Legislature, the only place in which these bonds could lawfully and honestly have been was under lock and key in the iron safe of the Blue Ridge Railroad Company. To hypothecate them even would be a fraud upon the State, and an unlawful use of her guaranty."

In 1871 the General Assembly passed an act entitled, "An Act to promote the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company." Section 6 of this act is as follows :

"The following clause in Section 2 of the Act of September 15, 1868, to authorize additional aid to the Blue Ridge Railroad Company in South Carolina, viz. : 'And further provided, That the said bonds, or any part thereof, shall not be used unless upon the express condition that upon application to the Congress of the

United States or to private capitalists, the amount of $3,000,000 in currency, or so much of that sum as may be necessary, shall be furnished in exchange or upon the security of said bonds,' is hereby repealed."

It was subsequently contended that this section repealed the express condition in the Act of 1868 upon which the State became guarantor of the $4,000,000 of Blue Ridge Railroad bonds. In the case of *Gibbes* v. *Greenville & Columbia Railroad Company*, *13 S. C.*, *228*, the Court held that the Act of 1871 had never gone into effect, using this language:

"It does not appear that this act was ever accepted by the Greenville & Columbia Railroad Company or its creditors, or went into operation in whole or in part. Indeed the contrary appears * * *. The object of the act having failed, each and all of its parts also fail."

Therefore, when the Act of 1872 was passed "To relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company," there was no such liability upon which to ground the Act because of the express condition remaining unrepealed in the Act of 1868 with which there was no pretence of compliance.

The issue of $4,000,000 of bonds was illegal, fraudulent and void, and the recital of their existence and the acknowledgment of liability upon them made by the legislature in the Act of 1872 did not and could not validate them. The preamble to that Act shows the artful method of its authors intended to fix a basis for issuing the scrip. But, if the Act of 1868 was invalid, or if its condition had not been fulfilled, the false recital in the Act of 1872 could fasten no liability upon the State, and the scrip was really issued without consideration.

We, therefore, reach the following conclusions:

1. The Act of 1868 as an effort to create a public debt was void, because not passed in accordance with Article IX, Section 7 of the State Constitution.

2. The endorsement of the guaranty of the State upon the bonds of the Blue Ridge Railroad Company, was authorized only upon an express condition which was never complied with.

3. The condition being unfulfilled, the issuance of the bonds was fraudulent and void.

Purchasers of these bonds were bound to take notice of the terms and conditions of the Act under which they purported to be issued. The Act was referred to in the face of the bond. (See transcript, folios 3, 6 and 3.

5. The false recitals in the Act of 1872 did not create a debt or establish previous indebtedness in contemplation of Article IX, Section 10, of the State Constitution.

6. If there was no existing debt, the issue of scrip was unconstitutional and void.

7. The holders of the scrip took it with notice of the failure of the proviso in the Act of 1868; and that the validity of the Act of 1872, under the State Constitution, depended upon compliance with that proviso.

The undoubted connection of Mr. Wesley with State finances in South Carolina about that time would indicate that he had actual as well as constructive knowledge of the circumstances under which the scrip was issued. The face of the bond itself put him on notice of the conditions in the Act of 1868, and the recitals in the Act of 1872 notified him to inquire whether those conditions had been complied with. But the illegal scrip issued for the redemption of the illegal bonds furnished an inviting field for speculation and might have proved profitable had the succeeding legislatures ignored the Constitution.

Conclusion.

It is manifest to us that no real controversy now

exists, or in fact has ever existed, between the parties to this suit. We know from the testimony of Mr. Lyles, in *Tindal et al* v. *Wesley*, *167 U. S.*, *207*, that "Agricultural Hall" was originally purchased with "the sole object" of testing the liability of the State of South Carolina upon the Revenue Bond Scrip. This seems to be equally "the sole object" of the alleged sale to Mr. Eells—of Mr. Wesley's bill for specific performance—of Mr. Eells' acceptance of service and entry of appearance before the bill was filed—of the single issue made by the answer—of the submission of the case under stipulation—of no effort by either party to inform the Circuit Court that the mortgage was duly cancelled and satisfied—of the appeal to this Court, and of the opposition to the motion made on behalf of J. D. M. Shaw for leave to file brief. The intention of these parties to litigate between themselves an alleged liability of the State of South Carolina is no less apparent than the intention of the legislature of 1872 that the Revenue Bond Scrip should circulate as money.

No decision that the Court may render as to the validity of the Scrip, alleged to have been tendered, can affect the respective rights of these parties. The lien of the State upon the property in question has been discharged by legislative authority, and it is now "free from any valid or subsisting lien or encumbrance" regardless of the alleged tender.

The apprehension of appellant's counsel that the cancellation of the mortgage might be "some device which would be afterwards repudiated by legislative authority" is too absurd to need comment. He knows that once acted upon, it could not be repudiated. He also knows that "the dealings of the officers of the State of South Carolina with him" furnish no ground for his suspicion. Does this alleged apprehension furnish an excuse for failure to give the facts to the Circuit Court?

We repeat, Mr. Eells is not interested in the validity or invalidity of the Blue Ridge Bond Scrip, so far as his rights in this case are concerned, and any practical effect that a decision of the question may have will be upon the tax payer in South Carolina. If the issue is decided, he invokes for his protection Article IX of the State Constitution of 1868 and Article I, Section 10 of the Constitution of the United States.

Respectfully submitted,

WILLIAM A. BARBER.

APPENDIX.

FACSIMILE OF REVENUE BOND SCRIP, ISSUED UNDER ACT OF MARCH 2, 1872.

The Blue Ridge Railroad Company was chartered by an Act of the Legislature passed on the 16th day of December, 1852.

12 Stats., 182, Sections 13 and 14 of this Act are as follows :

XIII.—"That the faith and funds of the State of South Carolina, be, and the same are hereby, pledged to secure the punctual payment of any contracts which shall be made for borrowing money by the Blue Ridge Railroad Company in South Carolina, from any person or persons, company or companies, corporation or corporations, to any amount not exceeding one million two hundred and fifty thousand dollars, either in the United States or in Europe, and when such contracts shall be made by bond or bonds signed by the President of said Company, under its seal, and countersigned by the Secretary or Treasurer thereof, it shall be the duty of the Comptroller-General of this State to endorse thereon, that the faith and funds of the State of South Carolina are pledged to the faithful performance of the said contract or contracts, as it respects the punctual payment both of the principal and interest, according to the terms of the said contract or contracts: *Provided*, That the interest to be made payable thereon, shall not exceed six percent per annum, in quarterly or half yearly payments; *And Provided*, also, That the Comptroller-General shall not endorse any such contract or contracts until satisfactory proof is produced to the Governor of the State, or the Comptroller-General, that five hundred thousand dollars are duly subscribed by responsible persons, companies or corporations to the capital stock of the said Blue Ridge Railroad Company in South Carolina; *And Provided, further*, That such endorsement shall not be made until the Governor or Comptroller-General shall have satisfactory proof that such subscriptions have been made, or aid furnished to other railroad companies in North Carolina and Tennessee, designed to connect the said Blue Ridge

Railroad with the Georgia & East Tennessee Railroad, as shall give reasonable assurance of the construction of the said North Carolina and Tennessee Railroads.

XIV.—That as soon as the Comptroller-General shall have made any such endorsement on any such contract, the whole estate, property and funds, within the State, which the said Company may then possess, or shall afterwards acquire, shall thenceforth stand pledged and mortgaged to the State, without any further act or deed on the part of the Company, for the faithful and punctual performance on the part of the said Company, of such contract, in priority and preference of any other debt which the said Company may then or at any other time owe: *Provided*, That nothing herein contained shall be construed to prevent the said Blue Ridge Railroad Company in South Carolina, from applying the proceeds of the loan so made by them, and the instalments which may be called for and paid in, on the stock of the Company, for the purposes of constructing, equipping and working the road, and for no other purpose, except to pay the interest on the said loan or loans, and the ultimate extinguishment of the principal thereof: *And Provided, further*, That so long as no part of the principal of the debt of the Company under the contracts aforesaid, shall be due and unpaid, it shall be lawful for the Company to divide among its stockholders its surplus net income, after payment of the interest due upon its debts: *And Provided, further*, That the Comptroller-General shall not endorse as aforesaid, any such bond or bonds, until the stockholders in the said Company shall have paid in two hundred and fifty thousand dollars, and the same shall have been expended in the construction of the road; whereupon the Comptroller-General shall be authorized to endorse such bonds to an amount not exceeding six hundred and twenty-five thousand dollars, and when two hundred and fifty thousand dollars more shall have been paid in by the stock-

holders, and expended as aforesaid, he shall be authorized to endorse such bonds to the further amount of six hundred and twenty-five thousand dollars: *And Provided, also*, That none of the said bonds endorsed as aforesaid, shall be issued or sold, unless the said Company receive therefor their full par value, and if any bonds so endorsed shall be sold or issued in violation of this condition the endorsement thereon shall be void."

ACT OF DECEMBER 21ST. 1854.

An Act to Authorize Aid to the Blue Ridge Railroad in South Carolina.

I.—Be it enacted by the Senate and House of Representatives now met and sitting in General Assembly, and by the authority of the same, That whenever satisfactory proof is produced to the Comptroller-General, within two years after the passing of this Act, that one million of dollars have been subscribed by responsible persons, companies or corporations, to the capital stock of the Blue Ridge Railroad Company in South Carolina, he is hereby authorized and required to subscribe, on behalf of the State, the sum of five hundred thousand dollars; and when satisfactory proof is produced of a further subscription, by responsible persons, companies or corporations, of five hundred thousand dollars, and also that at least one-fifth of the subscribed capital of the Company is held by responsible individuals or private corporations, then the Comptroller-General is authorized and required to subscribe, on behalf of the State, the further sum of five hundred thousand dollars. And on thus subscribing, the Comptroller-General shall take from said Company certificates of such an amount of shares in said capital stock as the State shall be entitled to by her said subscription.

II.—That the State shall in no way whatever, on account of this subscription, be held liable for debts or contracts, or assessments of the said Railroad Company.

III.—That the State shall have the same rights in the Company and in its management as is reserved to private shareholders; and the General Assembly shall at all times have authority to examine into its condition; and the said Company shall annually submit to the General Assembly a report exhibiting the condition of its affairs and its prospects.

IV.—That the subscriptions shall be paid in the manner and subject to the terms and conditions hereinafter expressed.

V.—That the Governor of the State of South Carolina be, and he is hereby authorized and directed, in the name of the said State, to issue bonds to be countersigned by the Comptroller-General, not exceeding in all the sum of one million dollars, which shall be payable in five instalments of two hundred thousand dollars each, the first instalment to be payable after the expiration of twenty years, and the remaining eight hundred thousand dollars in four equal annual successive instalments thereafter: *Provided*, That the Governor and Comptroller-General may pay for the aforesaid subscriptions in cash, or in the above bonds at par, as they shall deem best: *Provided, also*, That the interest to be paid on such bonds shall not exceed the rate of six per cent. per annum.

VI.—That whenever satisfactory proof shall be produced to the Comptroller-General that the sum of two hundred thousand dollars has been paid in by the shareholders, and expended in the construction of the road, he shall pay to the said Company on behalf of the State, a like sum of two hundred thousand dollars; and

for every like sum so paid in and expended by the shareholders he shall pay to the Company two hundred thousand dollars, and so on until the whole subscription of one million dollars shall be exhausted.

VII.—That the faith and the funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payments of any contracts which shall be made for borrowing money by the Blue Ridge Railroad Company in South Carolina, from any person or persons, company or companies, corporation or corporations, to any amount not exceeding one million dollars, either in the United States or in Europe, and when such contracts shall be made by bond or bonds, signed by the President of the Company under its seal, and countersigned by the Secretary or Treasurer thereof, it shall be the duty of the Comptroller-General of this State to endorse thereon that the faith and funds of the State of South Carolina are pledged to the faithful performance of the said contract or contracts, as it respects the punctual payment both of the principal and interest according to the terms of the said contract or contracts: *Provided*, That the interest to be made payable thereon shall not exceed seven per cent. per annum, in quarterly or half yearly payments, and the said bonds so endorsed shall be not sold or issued below the par value thereof, or if so sold or issued below their then par value, the endorsement thereon shall be void: *And Provided, also*, That the Comptroller-General shall not endorse any such contract or contracts until satisfactory proof is produced to the Governor of the State, or the Comptroller-General, that five hundred thousand dollars are duly subscribed by responsible persons, companies or corporations, to the capital stock of the said Blue Ridge Railroad Company in South Carolina: *And provided, further*, That such endorsement shall not be made until the Governor or Comptroller-General shall have satisfactory proof that such sub-

scriptions have been made or aid furnished to other railroad companies in North Carolina and Tennessee, designed to connect the said Blue Ridge Railroad Company with the Georgia and East Tennessee Railroad as shall give reasonable assurance of the construction of the said North Carolina, Georgia and Tennessee Railroads, nor until the said contract or contracts, bond or bonds have been secured by mortgages of the whole estate, property and funds within the State, which the said Company may then possess or shall afterwards acquire, the whole estate, property and funds within the State of Georgia which the Blue Ridge Railroad chartered by the said State of Georgia may then possess, or shall afterwards acquire; the whole estate, property and funds within the State of North Carolina which the Tennessee River Railroad Company, chartered by the said State of North Carolina, may then possess or shall afterwards acquire; and the whole estate, property and funds within the State of Tennessee which the Knoxville & Charleston Railroad Company, chartered by the said State of Tennessee, may then possess or shall afterwards acquire, saving and excepting so much of said estate, property and funds lying within the State of Tennessee as may be subject to the lien now existing in favor of said State, not exceeding the sum of nine hundred thousand dollars, which mortgages may also secure, in equal number and without any priority or preference, other bonds of the said Blue Ridge Railroad Company of South Carolina, not exceeding in the whole two million five hundred thousand dollars: *Provided*, That nothing herein contained shall be construed to prevent any of the said companies from applying any of the proceeds of the loan so made by them, and the instalments which may be called for and paid in on the stock of the said companies for the purpose of constructing, equipping and working their respective roads, and for no other purpose except to pay the interest on the said loan or loans and the ultimate extinguishment

of the principal thereof: *And provided, further*, That so long as no part of the principal of the debt of the company, under the contracts aforesaid, shall be due and unpaid, it shall be lawful for the said company to divide among their respective stockholders their surplus net income after payment of the interest due upon the said debts: *And provided, further*, That the Comptroller-General shall not endorse, as aforesaid, any such bond or bonds until the stockholders in the said Blue Ridge Railroad Company in South Carolina shall have paid in two hundred and fifty thousand dollars, and the same shall have been expended in the construction of their road; whereupon the Comptroller-General shall be authorized to endorse such bonds to an amount not exceeding five hundred thousand dollars; and when two hundred and fifty thousand dollars more shall have been paid in by the stockholders and expended as aforesaid, he shall be authorized to endorse such bonds to the further amount of five hundred thousand dollars.

VIII.—That the thirteenth and fourteenth sections of an act entitled "An Act to incorporate the Blue Ridge Railroad Company in South Carolina" be and the same are hereby repealed.

IX.—That from and after the 21st day of January next, no person shall be President or a Director of the said Blue Ridge Railroad Company in South Carolina who is not the *bona fide* owner, for himself and in his own right of at least five thousand dollars of the capital stock of the said company.

ACT OF DECEMBER 22ND, 1859.

AN ACT TO GRANT AID TO THE BLUE RIDGE RAILROAD.

I.—Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly,

and by the authority of the same, That the Comptroller-General is hereby authorized and directed to subscribe three hundred and ten thousand dollars to the stock of the Blue Ridge Railroad Company in South Carolina for the purpose of completing the said road to Walhalla: *Provided*, That the aid granted by this Act shall not be construed to exonerate the stockholders from paying up their subscriptions to the capital stock of the said Company, but the Company shall call in and apply the same according to the provisions of their charter.

II.—That the said sum shall be paid to the Company in bonds of the State, payable in five years, at six per cent. interest per annum, to be signed by the Comptroller-General, and issued to the said Company upon the making of the said subscription.

III.—The faith and funds of the State, and more especially the amount now due to this State by the General Government of the United States for various claims on the said United States for revolutionary services and matters growing out of the Florida War, and other matters, through the agent of the State, lately accredited to the said Government, are hereby pledged for the redemption of the principal and interest of the said bonds.

IV.—All the moneys arising from the subscription under this Act shall be applied by the said Company towards completing the road to Walhalla and equipping the same for use.

ACT OF SEPTEMBER 15TH, 1868.

AN ACT TO AUTHORIZE ADDITIONAL AID TO THE BLUE RIDGE RAILROAD COMPANY IN SOUTH CAROLINA.

WHEREAS, the General Assembly of the State of

South Carolina by an Act passed the 21st day of December, in the year of our Lord one thousand eight hundred and fifty-four, and entitled "An Act to authorize aid to the Blue Ridge Railroad Company in South Carolina," *provided*, "that the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of any contracts which shall be made for borrowing money by the Blue Ridge Railroad Company in South Carolina, from any person or persons, company or companies, corporation or corporations, to any amount not exceeding one million of dollars, either in the United States or Europe; and when such contracts shall be made by bond or bonds signed by the President of the Company, under its seal, and countersigned by the Secretary or Treasurer thereof, it shall be the duty of the Comptroller-General to endorse thereon that the faith and funds of the State are pledged to the faithful performance of said contract or contracts, as it respects the punctual payment, both of the principal and interest, according to the terms of the said contract or contracts: *Provided*, That certain conditions particularly recited in section seven of said Act be first executed." And the said Blue Ridge Railroad Company in South Carolina secured the said endorsement by a mortgage of all their property in the States of South Carolina, Georgia, North Carolina and Tennessee, duly executed and recorded; and, whereas, the Comptroller-General of the State has not endorsed any of the bonds issued by the said Blue Ridge Railroad Company in South Carolina, under the authority of said Act; and, whereas, the conditions imposed upon said endorsement by said Section seven, have become impossible and injudicious, while the necessity of the completion of the said road has become more urgent in the interest of the State; therefore,

SECTION I. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met

and sitting in General Assembly, and by the authority of the same, without reference to the said provisions and conditions, whenever any contract or contracts may be made by the President of the said Company under its seal, and as provided by said Act, and not exceeding one million dollars, it shall be the duty of the Comptroller-General to endorse thereon that the faith and funds of the State are pledged to the faithful performance of the said contract or contracts, as respects the punctual payment both of the principal and interest, according to the terms of the said contract or contracts: *Provided*, That so much of said issue as may be necessary, not exceeding three hundred thousand dollars, shall be applied to the redemption of the present bonded debt of the said Company.

SECTION 2. That the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of any contracts which shall be made by the Blue Ridge Railroad Company in South Carolina, from any person or persons, corporation or corporations, to an additional amount, not exceeding three million of dollars, either in the United States or Europe; and when such contracts shall be made by bond or bonds, signed by the President of the said Company, under its seal, and countersigned by the Secretary or Treasurer thereof, it shall be the duty of Comptroller-General of this State to endorse thereon that the faith and funds of the State of South Carolina are pledged to the faithful performance of said contract or contracts, as it respects the punctual payment both of the principal and interest, according to the terms of said contract or contracts: *Provided*, That the interest made payable thereon shall not exceed seven per cent. per annum, in quarterly or half yearly payments. And that as soon as the Comptroller-General shall have made any such endorsement on any such contract, the whole estate, property and funds in the State of South Carolina,

Georgia, North Carolina and Tennessee, which said Company may then possess, or shall afterwards acquire, shall thenceforth stand pledged and mortgaged to the State, without any further act or deed on the part of the Company, for the faithful and punctual performance on the part of said Company, of such contract in priority and preference of any other debt which the said company may hereafter create or incur: *And further provided*, That the said bonds or any part thereof shall not be used unless upon the express condition that upon application to the Congress of the United States, or to private capitalists, the amount of three million dollars in currency, or so much of that sum as may be necessary, shall be furnished in exchange or upon the security of said bonds.

SECTION 3. The said company shall have the right to increase the Board of Directors to fifteen members, of which Board the Governor of the State shall be *ex-officio* a member; that there shall be an additional officer to be known as Vice-President, whose duties and salary shall be prescribed by the Board; and that in all future meetings of the stockholders of said company the Governor of the State is hereby authorized to represent the stock of the State, either in person or by the appointment of proxies.

SECTION 4. The Governor of the State is hereby authorized to advance to the said company twenty thousand dollars from the Treasury of the State, to repair and keep in working condition the said road, if such amount should be necessary, in his opinion.

SECTION 5. *Be it further enacted*, That all provisions of the charter of the Blue Ridge Railroad Company, and all Acts or parts of Acts inconsistent with this Act, be, and the same are hereby, repealed.

ACT OF MARCH 2ND 1872.

AN ACT TO RELIEVE THE STATE OF SOUTH CAROLINA OF ALL LIABILITY FOR ITS GUARANTY OF THE BONDS OF THE BLUE RIDGE RAILROAD COMPANY BY PROVIDING FOR THE SECURING AND DESTRUCTION OF THE SAME.

WHEREAS, the State of South Carolina has by and in pursuance of the provisions of an Act approved the fifteenth day of September, A. D. 1868, entitled "An Act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," indorsed a guaranty of the faith and credit of the State on four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, comprehending the Blue Ridge Railroad Company in South Carolina; the Blue Ridge Railroad Company in Georgia; the Tennessee River Railroad Company in North Carolina; the Knoxville & Charleston Railroad Company in Tennessee, and the Pendleton Railroad Company in South Carolina, for the purpose of aiding the speedy completion of the said railroad, which bonds are liable for the debts of the said railroad companies; *and whereas*, the present condition of the finances of the State and of said companies are such as to make the further continuance of said bonds on the market inexpedient and unadvisable, and a serious injury and prejudice to the credit of the State; *and whereas*, the existence of the said four million dollars of bonds, so guaranteed, creates a large liability on the part of the State, which the treasurer may be required to meet at unforeseen and inopportune times; *and whereas*, the liability of the State, on account of such guaranty, should be faithfully met and discharged; therefore, in order to secure the recovery and destruction of the bonds and coupons of the said company, issued under and in pursuance of the provisions of the aforesaid act, now pledged in the City of New York and elsewhere, and to relieve the State of all liabilities whatsoever by reason of its endorsement and guaranty of said bonds.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by authority of the same, that the State Treasurer is hereby directed, with the consent in writing, of the President of the Blue Ridge Railroad Company, in South Carolina, to require the financial agent of the State, in the City of New York, immediately to deliver to the State Treasurer all the bonds of the Blue Ridge Railroad Company, indorsed and guaranteed by the State of South Carolina, which are now in his possession, and held by him as collateral security for advances made by the said financial agent, by the order of the financial board to the Blue Ridge Railroad Company; and upon delivery of said bonds the treasurer is hereby required to cancel the same in the manner hereinafter directed; and the said Blue Ridge Railroad Company shall thereupon be discharged from all liability to the State on account of such advances.

SECTION 2. That upon the surrender by the said Company to the State Treasurer, of the balance of the said four million dollars of bonds, issued by the said Blue Ridge Railroad Company, and guaranteed by the State, the State Treasurer is hereby authorized and required to deliver to the President of the Blue Ridge Railroad Company in South Carolina, treasury certificates of indebtedness (style revenue bond scrip) to the amount of one million eight hundred thousand dollars, the said certificates to be executed in the manner hereinafter directed; and if the said Company shall not be able to deliver all of said bonds at one time, the treasurer is authorized and required to deliver to the said president such amount of treasury certificates as shall be proportioned to the amount of bonds delivered.

SECTION 3. That to carry out the purposes of this Act, the State Treasurer is hereby authorized and required to have printed or engraved on steel, as

soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the State of South Carolina, in such form and of such denomination as may be determined on by the State Treasurer and the President of the Blue Ridge Railroad Company in South Carolina, to the amount of one million eight hundred thousand dollars; which revenue bond scrip shall be signed by the State Treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

SECTION 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in payment of special taxes levied to pay interest on the public debt; and the State Treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and, still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected in the same manner, and at the same time, as may be provided by law for the levy and collection of the regular annual taxes of the State; and the State Treasurer is hereby required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip hereby authorized to be issued until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

SECTION 5. That if any such revenue bond scrip is received in the treasury for the payment of taxes, the treasurer be, and he is hereby, authorized to pay out such revenue bond scrip in satisfaction of any claim

against the treasury, except for interest that may be due on the public debt.

SECTION 6. That upon the delivery to the State Treasurer of the said guaranteed bonds of the Blue Ridge Railroad Company, or of any part of them, the treasurer is hereby required to cause the same to be cancelled and destroyed, in the presence of the President of the Blue Ridge Railroad Company, in South Carolina, and in the presence of a joint committee of the Senate and House of Representatives of this State, to be for that purpose appointed.

SECTION 7. That whenever the whole number of the said guaranteed bonds shall have been delivered to the treasury as cancelled, as required by the provisions of this Act, the lien of the State of South Carolina upon the estate, property and funds of the said Blue Ridge Railroad Company, in this State, and of the other associated companies in the States of Georgia, North Carolina and Tennessee, as secured by the provisions of an act entitled "An Act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina", passed on the 15th day of September, A. D. one thousand eight hundred and sixty-eight, and all other claims or liens which are held by the State against said Company or Companies, on account of said guaranty, shall from henceforth be forever discharged and released; and should the said company be unable from any cause, to deliver all of said bonds, such liens shall be discharged and released to an extent which shall be proportional to the amount of such bonds actually delivered.

SECTION 8. That if the said Company shall accept the provisions of this Act, it shall be authorized, if the board of directors may desire, to change the corporate name of the Company to that of the Knoxville & South Carolina Railroad Company, and shall have power to extend its railroad, or construct branches thereof, to

any points or places in this State, with all the powers and privileges with which the said company is now vested by the provisions of its charter; and the said company shall have power to issue bonds and to secure the same by a mortgage, to such amount and in such manner as the board of directors may direct. And all sales of stock in the said Blue Ridge Railroad Company, in South Carolina, and its associate companies, formerly held by the State and sold by the Commissioners of the Sinking Fund be, and they are hereby, confirmed.

SECTION 9. That if any person shall forge or counterfeit the treasury scrip hereby authorized to be issued, or shall directly or indirectly aid or assist in the forging or counterfeiting of such scrip, or shall issue, or in any manner use any such forged or counterfeited scrip, he shall, on conviction thereof, be fined in the discretion of the Court, and shall be imprisoned in the penitentiary for a term not exceeding ten years."

WESLEY *v.* EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 176. Argued and submitted March 9, 1900.—Decided April 9, 1900.

Specific performance of an executory contract is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.

A court of equity will not compel specific performance if under all the circumstances it would be inequitable to do so.

It is a settled rule in equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation.

Speaking generally, a title is to be deemed doubtful where a court of coordinate jurisdiction has decided adversely to it or to the principles on which it rests.

THE case is stated in the opinion.

Mr. William H. Lyles for appellant.

Mr. Arthur St. J. Newberry for appellee.

Mr. William A. Barber as *amicus curiæ*, filed a brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States for the Northern District of Ohio by Wesley a citizen of New York against Eells a citizen of Ohio.

Opinion of the Court.

The case made by the bill was as follows: The State of South Carolina, being the owner in fee of certain real estate situated in the city of Columbia in that State — part of the property being known as Agricultural Hall — caused the same to be sold at public auction, Wesley becoming the purchaser.

By the terms of sale the purchaser was required to pay in cash one third of the price and to execute his bond and mortgage on the property to secure payment of the balance in two equal annual instalments with interest from the date of purchase, the obligor to have the option of paying the whole or any part of the sum so secured before the maturity thereof.

At the instance of Wesley the Commissioners of the Sinking Fund of South Carolina executed a deed in fee simple for the property to one J. W. Alexander who consented to act as trustee for the plaintiff, the deed however not containing any declaration of the trust. Thereupon Alexander executed to the Treasurer of the State his bond for the payment of the purchase price — the mortgagor being accorded the privilege of paying before maturity the whole or any part of the money secured.

The mortgage not having then been filed for record, and Wesley having furnished to Alexander a sufficient amount of what is known as South Carolina Revenue Bond Scrip, the latter tendered to the state Treasurer of South Carolina in such scrip the principal and interest of the above bond. That officer had authority to receipt for the sum due on the bond and mortgage. The tender was refused by the state Treasurer.

By the laws of South Carolina a tender in full of the amount due on a mortgage of real or personal property at any time when the mortgagor has the right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage, whether the amount be accepted or not and whether the mortgagor keeps himself in a position to make good the tender or not.

Notwithstanding the tender, the state Treasurer caused the above mortgage to be recorded in the proper office.

Subsequently, Alexander conveyed the premises in question to Wesley.

The bill contains a statement of the history of the above-mentioned revenue bond scrip and of the plaintiff's connection therewith. Reference was made to the act of the General Assembly of South Carolina approved the 15th day of September, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," and to the act approved the 2d day of March, 1872, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same," which provided for the issue of certificates of indebtedness styled revenue bond scrip, which should express that the sum mentioned therein was due by the State to bearer, and that the same would be received in payment of taxes and all other dues to the State except special taxes levied to pay interest on the public debt. By the fourth section of the above act of 1872 the faith and funds of the State were pledged for the ultimate redemption of the revenue bond scrip and county treasurers were required to receive the same in payment of all taxes levied by the State, except in payment of special taxes levied to pay interest on the public debt, and the state Treasurer and all other public officers were required to receive the same in payment of all dues to the State.

The plaintiff had received from the state Treasurer of South Carolina under the circumstances detailed in the bill (which need not be repeated) a large amount of revenue bond scrip. He stated that he was the owner and holder of the scrip received by him and charged in his bill that by the tender to the state Treasurer the Alexander mortgage had been extinguished by operation of law.

The revenue bond scrip referred to was in the following form:

$100. No. 21. $100.

Revenue Bond Scrip.

The State of [Palmetto Tree] South Carolina.

Columbia, S. C., *March* —, 1872.

Receivable as one hundred dollars in payment of all taxes

and dues to the State, except special tax levied to pay interest on public debt.

NILES G. PARKER, *State Treasurer.*

One hundred dollars. One hundred dollars.

Such being Wesley's relations to the mortgaged property he made a written contract with Eells whereby he agreed for the price of $20,000 to be paid in cash to convey to the latter in fee simple the premises in question, free from any valid lien or incumbrance whatever.

The plaintiff offered to deliver to Eells a deed for the premises in fee simple and demanded payment of the purchase price. But Eells refused to receive the deed or to pay the price, alleging that the scrip tendered by Alexander were not valid obligations of South Carolina and therefore did not constitute a legal tender of the amount due the State nor operate as an extinguishment of the mortgage.

The plaintiff brought into court and tendered a deed to Eells and offered to agree that the plaintiff might retain so much of the price for the property as would protect it against any taxes that had accrued upon it.

The relief asked was a decree that the defendant should accept the deed tendered to him and pay the purchase price of the property, less any sum to meet the taxes assessed upon it.

The defendant admitted in his answer that there were no liens or incumbrances upon the property except the mortgage described in the bill and such taxes as were due thereon to the State and to the city of Columbia. But he alleged that the statute authorizing revenue bond scrip to be received in payment of dues to the State had been repealed, and county auditors and county treasurers forbidden to collect any taxes for the redemption of such scrip; that the act under which the scrip was issued was in violation of the Constitution of the United States forbidding the States from emitting bills of credit and also in violation of the constitution of South Carolina, and such scrip was null and void.

The defendant stated in his answer that he had always been and was then willing to perform his contract, provided he re-

ceived a full and perfect title to the premises free from any valid lien and was protected in the quiet and peaceable possession thereof.

The plaintiff filed a general replication, and the cause was submitted on the pleadings and certain documentary evidence showing the history of the revenue bond scrip, the legislation of South Carolina, and certain decisions of the Supreme Court of that State.

The Circuit Court of the United States held that the bond scrip issued under the act of March 2, 1872, were bills of credit and void; that the tender of scrip by Alexander to the state Treasurer was therefore not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State; and that the Agricultural Hall property was still incumbered by the mortgage and plaintiff could not give defendant a clear title to it. The bill was dismissed at the plaintiff's cost.

In the memorandum of evidence used by stipulation of the parties reference was made to the case of *Tindal* v. *Wesley*, 167 U. S. 204, 221. But the decision there has no bearing upon the present case. That was an action by Wesley to recover the possession of the property here in dispute — the defendants being in possession only in their capacities as officers or agents of South Carolina, and insisting that the suit against them was, in legal effect, one against the State within the meaning of the Eleventh Amendment of the Constitution of the United States. "The settled doctrine of this court," it was said in that case, "wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf. . . . Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent." These extracts indicate the scope of the decision in *Tindal* v. *Wesley* and make it clear that that decision does not determine any question now presented.

Opinion of the Court.

The vital question in the present case is whether the plaintiff was entitled to a decree for specific performance. The plaintiff bases his right to such a decree upon the ground that Alexander's tender of revenue bond scrip to the Treasurer of South Carolina had the effect to extinguish the lien of the mortgage executed by him, and consequently that plaintiff's deed conveying the fee would give to Eells a good title. This view assumes that the revenue bond scrip tendered by Alexander to the state Treasurer was legally receivable in payment of the amount on the Alexander bond and mortgage. But as will be seen from an examination of the cases of *State ex rel. Shiver* v. *Comptroller General*, 4 S. C. 185, and *Auditor* v. *Treasurer*, 4 S. C. 311, the Supreme Court of South Carolina has held that the revenue bond scrip issued under the act of March 2, 1872, were bills of credit which the Constitution of the United States forbade the States to emit, and therefore were null and void. And in that view the court below concurred. What then will be the effect of a decree in the Circuit Court of the United States sitting in Ohio requiring the defendant to pay the amount he agreed to pay and to take the deed tendered him by the plaintiff? What would the defendant get under such a decree in consideration of the amount paid by him for the property? He would get a deed from Wesley for premises covered by a mortgage of record which the highest court of the State in which the property is situated will presumably hold not to have been discharged by the tender of revenue bond scrip. And we do not perceive that Eells could by any affirmative action on his part bring the question of the validity of that tender before any court in South Carolina for adjudication. He could not sue the State against its consent, and no suit except one to which the State was a party would effectively reach such a question and release the property from the incumbrance created by the Alexander mortgage. So that if compelled to take Wesley's deed Eells would be powerless to have his title made clear of record, unless the State brought suit to foreclose the mortgage and thereby enabled him in defence to relitigate the question already concluded in the courts of that State by judicial decision. It is thus manifest that a decree for specific performance would put upon him a title that

was not at all marketable and could not become such except by successful litigation.

In *Hennessy* v. *Woolworth*, 128 U. S. 438, 442, this court said: "Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case" — citing *Willard* v. *Tayloe*, 8 Wall. 557, 567; *Marble Co.* v. *Ripley*, 10 Wall. 339, 357; 1 Story's Eq. Jur. § 742; *Seymour* v. *Delancey*, 6 Johns. Ch. 222, 224. To the same effect are *McCabe* v. *Matthews*, 155 U. S. 550, 553; *Rust* v. *Conrad*, 47 Mich. 449, 454; *Petty* v. *Roberts*, 7 Bush, 410, 419; *Huntington* v. *Rogers*, 9 Ohio St. 511, 516. A court of equity will not compel specific performance if under all the circumstances it would be inequitable to do so. *Starnes* v. *Newsom*, 1 Tenn. Chy. Rep. 239, 244; *Parish* v. *Oldham*, 3 J. J. Mar. 544, 546; *Clowes* v. *Higginson*, 1 Ves. & Beames, 524, 527.

Again, it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. *Morgan's Heirs* v. *Morgan*, 2 Wheat. 290, 299, 301; *City of Tiffin* v. *Shawhan*, 43 Ohio St. 178, 183. And, speaking generally, a title is to be deemed doubtful where a court of coördinate jurisdiction has decided adversely to it or to the principles on which it rests. Fry on Specific Performance, 3d ed. § 870 and authorities there cited. One of the grounds upon which a decree for specific performance was denied in *Hepburn* v. *Auld*, 2 Cranch, 262, 278, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

The principle is well illustrated in *Jeffries* v. *Jeffries*, 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objections to the title was that it was incumbered by conditions that would interfere with the enjoyment of the property. The Supreme Judicial Court of Massachusetts there said: "Hence the propriety and the necessity of the rule in equity that a defendant, in proceedings for specific performance, shall

not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it. *Richmond* v. *Gray*, 3 Allen, 25; *Sturtevant* v. *Jaques*, 14 Allen, 523; *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title." So in *Lowry* v. *Muldrow*, 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, "courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits." Numerous other American cases announce the same rule.

The principle is also illustrated in many English cases. In *Parker* v. *Tootal*, 11 H. L. Cas. 143, 158, it was said to be an established rule of equity not to compel a purchaser to take a doubtful title. In *Rose* v. *Calland*, 5 Ves. 185, 187, which was a suit by devisees in trust to obtain the specific performance of an agreement entered into by the defendant for the purchase of an estate, certain reasons were given why the plaintiff could not make a sufficient title, one of which was that the Court of Exchequer, in *Nagle* v. *Edwards*, 3 Anstr. 702, had announced principles which, if followed, would prevent the defendant from obtaining such a title as he ought to have. The Lord Chancellor said: "If I was to send this case to the master, I should create a needless expense; for upon the case in the Court of Exchequer, *Nagle* v. *Edwards*, which I have looked into, my difficulty is this: Can I make a person take a title in the face of that decision? If I do, I decree him to enter into a lawsuit. . . . I desire to be understood as not entirely agreeing with the determination of the Court of Exchequer. But I should be in a strange situation in desiring a purchaser to take this title, because I think the point a pretty good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense." So in *Price* v.

Stange, 6 Madd. Chy. 159, 165, in which the Vice Chancellor said: "In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision." In *Pyrke* v. *Waddingham*, 10 Hare, 1, 8, it was held that the court will not compel a purchaser to take a title that "will expose him to litigation or hazard."

We are of opinion that the plaintiff's title is not such as a court of equity should compel the defendant to accept. He should not have been compelled to accept it even if the court below had been of opinion that the revenue bond scrip tendered by Alexander were not bills of credit.

Upon the grounds stated, and without expressing any opinion upon the question whether the revenue bond scrip referred to were or were not bills of credit within the meaning of the Constitution of the United States, the decree below is

Affirmed.